Supreme Court U.S.
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NO. _____

IN THE UNITED STATES SUPREME COURT

GRANITE STATE OUTDOOR ADVERTISING, INC.,

Petitioner,

v.

CITY OF FORT LAUDERDALE, FLORIDA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether overbreadth standing no longer operates to allow an applicant for a sign to facially challenge the lack of procedural safeguards in a sign permitting regulation and whether overbreadth standing no longer allows a facial challenge to any other provision of a sign ordinance that has not been directly applied to the applicant?

2. Whether the Eleventh Circuit Court of Appeals erroneously affirmed the district court's application of the incorrect standard by not presuming the allegations of the complaint to be true and by relying on affidavit evidence from the defendant?

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

The parties to this proceeding are properly set forth in the case caption. Petitioner Granite State Outdoor Advertising, Inc. has no parent corporation and no publicly held company owns ten percent or more of the corporation's common stock.

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OPINIONS BELOW

The unpublished opinion of the three-judge panel of the Eleventh Circuit Court of Appeals is reported as *Granite State Outdoor Advertising, Inc. v. City of Fort Lauderdale*, 2006 WL 2560679 (11th Cir. Sept. 6, 2006).[1] The opinion and judgment of the district court are unreported.

JURISDICTION

The Court of Appeals entered judgment on September 6, 2006. A petition for rehearing and hearing en banc was denied on October 17, 2006. The Court of Appeals had jurisdiction pursuant to 28 U.S.C. § 1291. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The First Amendment to the Constitution of the United States provides that "Congress shall make no law . . . abridging the freedom of speech or of the press . . . ."

Section 1983 of Title 42 of the United States Code states that any person that "subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

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[1] The Appendix attached hereto includes the circuit court decision (1a-8a), and the district court decision (9a-30a).

STATEMENT

I. OVERVIEW OF THE CASE

Pursuant to 42 U.S.C. § 1983, Petitioner Granite State Outdoor Advertising, Inc. ("Granite State") filed suit against Respondent City of Fort Lauderdale, Florida ("City"), alleging that the City's Sign Ordinance violated Granite State's and others' First Amendment rights. Granite State alleged in its Complaint that the Sign Ordinance was facially invalid because, *inter alia*, it failed to contain the necessary procedural safeguards and endowed City officials with unbridled discretion to issue or withhold sign permits. The City responded by filing a Motion to Dismiss pursuant to Federal Rule 12(b)(6). The district court granted the City's Motion to Dismiss finding that Granite State lacked standing to challenge the Sign Ordinance except for one provision, the ban on advertising signs with "off-premise" messages, and that this particular provision was constitutional. (9a-30a).

The Eleventh Circuit panel upheld the decision of the district court that Granite State only had standing to challenge Subsection 47-22.11(E)(1) of the Sign Ordinance – just one line of the 26-page Sign Ordinance – and specifically rejected Granite State's contention that it had standing to facially challenge the Ordinance's licensing scheme under the overbreadth doctrine. (6a-8a). Both courts held that Granite State, even though it had unquestionably applied for permits from the City, had no standing to challenge the permitting process or any other deficiency in the code. Moreover, the Eleventh Circuit completely ignored Granite State's argument that the district court applied the wrong standard in rendering its decision on the City's Motion to Dismiss. (1a-8a).

II. FACTUAL BACKGROUND OF THE CASE

Granite State is in the business of developing sign locations to be used for the dissemination of both commercial and noncommercial speech. (10a). Granite State entered into leases with owners of real property in the City authorizing Granite State to post a total of nine signs. *Id.* Granite State applied to the City for permission to post the signs. *Id.* The City enforced its Sign Ordinance to deny Granite State's applications. (10a-11a).

III. PROCEEDINGS BELOW

Granite State filed suit and challenged the constitutionality of Fort Lauderdale's Sign Ordinance. (2a). In lieu of filing an Answer, the City filed a Motion to Dismiss. (12a). Without converting the motion to one for summary judgment, the district court granted dismissal, finding that Granite State lacked standing to challenge the Ordinance, including the licensing scheme, and that the one subsection that Granite State had standing to challenge (six words out of 26 pages) was constitutional. (12a-30a).

Appellate briefing was concluded on October 17, 2005. As a result of the Eleventh Circuit's decision to rehear en banc *Tanner Advertising Group, L.L.C. v. Fayette County*, 411 F.3d 1272 (11th Cir. 2005), the appeal was placed in abeyance along with several other cases in which sign applicants had been denied standing. After the Eleventh Circuit's en banc decision in *Tanner*, 451 F.3d 777 (11th Cir. 2006), and the panel decision in *CAMP Legal Defense Fund, Inc. v. City of Atlanta*, 451 F.3d 1257 (11th Cir. 2006), were issued, the court requested supplemental briefing. (2a). Shortly thereafter, without oral argument, the Eleventh Circuit affirmed the decision of the district court, finding that Granite State did not have standing to facially challenge the code as unduly discretionary or lacking procedural

safeguards. (6a-8a). The three other cases involving sign applicants that had been denied standing to challenge sign ordinances were also decided in unpublished decisions without argument.[2]

REASONS FOR GRANTING THE PETITION

The decision of the Eleventh Circuit Court of Appeals affirming the district court's grant of dismissal exposes a conflict among the circuit courts of appeal. The Eleventh Circuit's conclusion that a speech applicant does not have standing to facially challenge a permitting scheme on the ground that it is an unconstitutional prior restraint on speech and that it conveys unbridled discretion to government actors is in direct conflict with decisions from at least the Second, Sixth, and Ninth Circuits. This new position of the Eleventh Circuit has now been adopted by the Fifth Circuit as well. Speech applicants must be able to mount facial challenges under the overbreadth doctrine to licensing schemes that deny applicants a prompt or objective response. Without access to such court review, government officials will have unchecked power to delay or subjectively deny permits for speech activity, to include parades, demonstrations, festivals, solicitation, and signs. Therefore, the Court should grant this petition in order to resolve the dispute among the circuit courts.

In addition to resolving a dispute among the circuit courts on a matter of great importance, granting this petition will also allow this Court to remedy a departure from the accepted and usual course of judicial proceedings. The

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[2] *Advantage Adver., L.L.C. v. City of Hoover*, 2006 WL 2344957 (11th Cir. Aug. 11, 2006) (now final); *Granite State Outdoor Adver., Inc. v. Cobb County*, 2006 WL 2373528 (11th Cir. Aug. 17, 2006) (remanded for consideration of Georgia Constitution which was found to be more protective of free speech than First Amendment); *Tinsley Media, L.L.C. v. Pickens County*, 2006 WL 2917561 (11th Cir. Oct. 12, 2006).

Eleventh Circuit has abused the use of unpublished decisions in a seeming attempt to bury its controversial holdings in this and other similar cases. Also, the court's misapplication of the standard of review on motion to dismiss is a proper ground for this Court to exercise its supervisory power of review.

I. THE ELEVENTH CIRCUIT'S DECISION EPITOMIZES THE CONFLICT AMONG THE CIRCUITS REGARDING THE OVERBREADTH STANDING DOCTRINE.

The overbreadth standing doctrine plays an important role in preserving First Amendment rights against overly broad licensing schemes and those with no procedural safeguards, including time limits on the permitting process. While a plaintiff must generally demonstrate that it has suffered an injury-in-fact, that there is a causal connection between the injury and the conduct complained of, and that it is likely that the injury will be redressed by a favorable decision,[3] the Supreme Court created an exception to these general rules of standing beginning in *Thornhill v. Alabama*, 310 U.S. 88, 60 S. Ct. 736 (1940), where this Court noted that the very existence of some broadly written statutes may have such a deterrent effect on free expression that they should be subject to challenge even by a party whose own conduct may be unprotected. The Eleventh Circuit's recent analysis presents an odd contrast with *Thornhill*, because speech applicants are being subjected to stricter standing limits than other litigants, and are denied standing to challenge even permitting schemes under which they have unquestionably applied.

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[3] *See, e.g., Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 112 S. Ct. 2130, 2136 (1992).

As the Supreme Court established in *Members of the City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 799, 104 S. Ct. 2118, 2125 (1984), the overbreadth "exception from the general rule is predicated on 'a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression.'" (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 612, 93 S. Ct. 2908, 2916 (1973)).

In *Broadrick* the Court held "[i]t has long been recognized that the First Amendment needs breathing space and that statutes attempting to restrict or burden the exercise of First Amendment rights must be narrowly drawn and represent a considered legislative judgment that a particular mode of expression has to give way to other compelling needs of society." 413 U.S. at 611, 93 S. Ct. at 2915. Moreover, this Court noted that it "has altered its traditional rules of standing to permit – in the First Amendment area – 'attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity.'" *Id.* at 612, 93 S. Ct. at 2916 (citing *Dombrowski v. Pfister*, 380 U.S. 479, 486, 85 S. Ct. 1116, 1121 (1965)). Therefore, litigants "are permitted to challenge a statute not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression." *Broadrick*, 413 U.S. at 612, 93 S. Ct. at 2916.

A primary reason the overbreadth doctrine was created was to encourage the evaluation and removal of unconstitutional speech restrictions where most of those regulated have little or no ability to assert a challenge. The overbreadth doctrine was developed "to enable persons who are themselves unharmed by the defect in a statute

nevertheless to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others, ***in other situations not before the Court***." *Board of Trustees v. Fox*, 492 U.S. 469, 484, 109 S. Ct. 3028, 3037 (1989) (emphasis added). This rule was seemingly extended to sign companies in *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 504, n.11, 101 S. Ct. 2882, 2890 (1981) ("we have never held that one with a 'commercial interest' in speech also cannot challenge the facial validity of a statute on the grounds of its substantial infringement of the First Amendment interests of others"). Seven Justices joined the Court's holding in *Metromedia* establishing a sign company's ability to facially challenge a sign ordinance. Id. at 493, 101 S. Ct. at 2885 (holding of Justices White, Stewart, Marshall, and Powell); id. at 525, 101 S. Ct. at 2901 (concurrence of Justices Brennan and Blackmun) (specifying that "[w]here the plurality and I disagree is . . . the appropriate analytical framework to apply"); id. at 544, 101 S. Ct. at 2911 (Stevens, J., dissenting in part) (recognizing "[a]ppellants, of course, have standing to challenge the ordinance because of its impact on their own commercial operations"). The Court established that those who have a "commercial interest" in that signs, including outdoor advertisers, have standing to facially challenge sign ordinances.

A. The Eleventh And Fifth Circuits' Overbreadth Analysis Conflicts With Other Circuits.

Despite this Court's plain reasoning for the overbreadth doctrine and the unbroken development of this body of jurisprudence, the Eleventh and Fifth Circuits, as evidenced by the decision below as well as *Granite State Outdoor Advertising, Inc. v. City of Clearwater*, 351 F.3d 1112 (11th Cir. 2003), and *Brazos Valley Coalition for Life,*

Inc. v. City of Bryan, 421 F.3d 314 (5th Cir. 2005), threaten to deprive millions of persons and organizations of the benefits of the overbreadth doctrine. Their narrow view of standing is at odds with other circuit courts.

Granite State sought to facially challenge under the overbreadth doctrine various provisions of the Ft. Lauderdale Sign Ordinance on the grounds that they conveyed unbridled discretion to officials or were unconstitutional prior restraints. (3a). While the Eleventh Circuit recognized this Court's holding in *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 755-56, 108 S. Ct. 2138, 2143 (1988), that "when a licensing scheme allegedly vests unbridled discretion in a government official over whether to permit or deny expressive activity, one who is subject to the law may challenge it facially without the necessity of first applying for, and being denied a license," the court reasoned that because the signs requested were banned under the ordinance, Granite State was therefore not subject to the permitting requirements. (6a). This approach removes the ability of one who has submitted an application under a law to mount a facial challenge by limiting the scope of the court's analysis to only the use applied for, rather than allowing a true facial challenge.

The Eleventh Circuit's logic ignores the fundamental underpinnings of the overbreadth doctrine:

> [i]n the area of freedom of expression it is well established that one has standing to challenge a statute on the ground that it delegates overly broad licensing discretion to an administrative office, ***whether or not his conduct could be proscribed by a properly drawn statute***, and whether or not he applied for a license.

Lakewood, 486 U.S. at 755-56, 108 S. Ct. at 2143 (emphasis added). The Eleventh Circuit's new approach eviscerates this rule.

The Eleventh Circuit is not alone in its narrow application of the overbreadth doctrine. As seen in *Brazos Valley Coalition for Life*, the Fifth Circuit has adopted the Eleventh Circuit's approach. In *Brazos*, the Fifth Circuit rejected the appellants' facial challenge to numerous provisions of the sign code at issue because the provisions were "unrelated and [did] not apply . . . to activities in which appellants have alleged below that they engaged in." 421 F.3d at 323 (citing *Clearwater*, 351 F.3d at 1116-17). The approach adopted in *Brazos* ties the scope of a litigant's facial challenge to that of its as-applied challenge. *Id.*[4] Thus, although at the time Granite State's petition for certiorari in *Clearwater* was denied it could easily have appeared that *Clearwater* was simply a mistake and an aberration, *Brazos* and the several recent Eleventh Circuit opinions prove that the overbreadth doctrine is under siege.

This approach advocated by at least the Fifth and Eleventh Circuits is in direct contrast to the approach taken by other circuit courts. *E.g.*, *R.S.W.W., Inc. v. City of Keego Harbor*, 397 F.3d 427, 436-37 (6th Cir. 2005); *Lamar Adver. of Penn, LLC v. Town of Orchard Park*, 356 F.3d 365, 374-75 (2d Cir. 2004); *Peachlum v. City of York*, 333 F.3d 429, 430 (3d Cir. 2003); *Giovani Carandola, Ltd. v. Bason*, 303 F.3d 507; 512-51 (4th Cir. 2002); *Deja Vu of Nashville, Inc. v. Metropolitan Gov't of Nashville and Davidson County*, 274 F.3d 377, 385 (6th Cir. 2001), *cert. denied*, 535 U.S. 1073 (2002); *Ackerley Communications of Mass., Inc. v. City of Cambridge*, 88 F.3d 33 (1st Cir. 1996); *Desert Outdoor Adver., Inc. v. City of Moreno Valley*, 103 F.3d 814, 818 (9th Cir. 1996); *National Adver. Co. v. Town of Babylon*, 900

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[4] *See also Gospel Missions v. City of Los Angeles*, 328 F.3d 548, 553-55 (9th Cir. 2003) (rejecting challenge to certain provisions of professional fundraising ordinance on similar grounds).

F.2d 551, 553, 555 (2d Cir. 1990), *cert. denied*, 492 U.S. 852 (1990). The majority of these decisions involved facial challenges to sign ordinances by outdoor advertising companies like Granite State.

In *R.S.W.W.*, for example, the Sixth Circuit reached the opposite conclusion of what the Eleventh Circuit reached below, and reversed the grant of a motion to dismiss. 397 F.3d at 436-37. Specifically, the Sixth Circuit recognized,

> "[W]hen a licensing statute allegedly vests unbridled discretion in a government official over whether to permit or deny expressive activity, one who is subject to the law may challenge it facially without the necessity of first applying for, and being denied, a license." The "root of this long line of precedent is the time-tested knowledge that in the area of free expression a licensing statute placing unbridled discretion in the hands of a government official or agency constitutes a prior restraint and may result in censorship."

Id. at 437 (internal citations omitted). In its complaint, the plaintiff alleged that the sign code granted overly broad licensing discretion to the city when processing applications. *Id.* However, the Sixth Circuit commented, "[f]or purposes of determining [plaintiff's] standing on this claim, it is irrelevant that the city did not actually deny [plaintiff's] request to change its sign but only delayed consideration of the request." *Id.* Thus, in contrast to the Eleventh and Fifth Circuits, the Sixth Circuit recognized that the particular circumstances play little role in analyzing the facial challenge. *See Forsyth County v. Nationalist Movement*, 505 U.S. 123, 133 n.10, 112 S. Ct. 2395, 2403 (1992) ("[f]acial attacks on the discretion granted a decisionmaker are not dependent on the facts"). Therefore, the Sixth Circuit

afforded the plaintiff standing to facially challenge the sign code's permitting scheme. *Id.*

That a litigant may facially challenge a statute regardless of the facts of the as-applied challenge is also seen in the Third Circuit's decision in *Peachlum v. City of York*, 333 F.3d 429 (3d Cir. 2003). There, the Third Circuit noted, "[i]n the case of overbreadth challenges, standing arises 'not because [the plaintiff's] own rights of free expression are violated, but because of a judicial prediction or assumption that the [challenged statute's] very existence may cause others not before the court to refrain from constitutionally protected speech or expression.'" *Id.* at 438 (quoting *Broadrick*, 413 U.S. at 612, 93 S.Ct. 2908). Therefore, a sign company can challenge a regulation "because [it] also threatens others not before the court – those who desire to engage in legally protected expression but who may refrain from doing so rather than risk prosecution or undertake to have the law declared partially invalid." *Id.* (relying on *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 503, 105 S. Ct. 2794 (1985)).

The approach taken by the Eleventh and Fifth Circuits also conflicts with the Second Circuit's holding in *Lamar Advertising of Penn, LLC v. Town of Orchard Park*, 356 F.3d 365 (2d Cir. 2004). In *Orchard Park*, the lower court had found that Lamar lacked standing to challenge the sign ordinance. *Id.* at 373-74. On appeal, the Town argued that because the applications submitted by Lamar were for signs larger than the size permitted under the ordinance, Lamar lacked standing. The Second Circuit rejected this argument, however, holding, "[t]hat Lamar only sought permits for those signs that were larger than the size allowed, however, is of little consequence; Lamar need not have first sought and been denied *any* permit prior to filing a facial challenge." *Id.* at 374 (citing *National Adver. Co. v. Town of Babylon*, 703 F. Supp. 228, 232-33 (E.D.N.Y. 1989), *aff'd in relevant part*, 900 F.2d 551, 555 (2d Cir. 1990)). In addition, the Second

Circuit also noted, "[b]ecause we find that Lamar's standing to bring this facial challenge is not defeated by its not having submitted permit requests for signs that would have met Orchard Park's size restrictions, we need not address the parties' factual dispute . . . ." *Id.* at n.12. As a result, the court reversed the lower court's finding that Lamar lacked standing to facially challenge the ordinance.

The approach adopted by the Second Circuit of allowing a facial challenge even if the permit requests were for signs that were not in compliance with the code stands in direct contrast to the Eleventh Circuit's approach of denying Granite State standing to facially challenge the Ft. Lauderdale Sign Ordinance because the signs it applied for were not permitted.

The approach adopted by the Eleventh Circuit also conflicts with the Ninth Circuit's opinion in *Desert Outdoor Advertising, Inc. v. City of Moreno Valley*, 103 F.3d 814 (9th Cir. 1996). In *Desert Outdoor*, the Ninth Circuit reviewed the lower court's grant of summary judgment in favor of the city. *Id.* at 816. On appeal, the city asserted that the plaintiffs did not have standing to challenge the permitting requirements because no applications were filed. *Id.* at 818. The Ninth Circuit disagreed, finding that the plaintiffs "also have standing to challenge the permit requirement, even though they did not apply for permits, because applying for a permit would have been futile." *Id.* One of the reasons the Ninth Circuit found that applying for a permit would have been futile was because "the ordinance flatly prohibited appellants' off-site signs located outside the three permitted zones." *Id.* The court found that the appellants indeed had standing to challenge the permitting requirement on the ground it conveyed unbridled discretion and ultimately they found it unconstitutional. *Id.* at 819. Even though the appellants in *Desert Outdoor* had never applied for a permit, and the signs they operated were flatly prohibited by the ordinance, the Ninth Circuit still permitted a facial challenge.

The result of the conflict between the Eleventh and Fifth Circuits and the other circuits is clear: parties asserting First Amendment challenges in the Eleventh and Fifth Circuits are now denied standing to challenge speech restrictions under the overbreadth doctrine while such challenges are allowed elsewhere. Such a disparity in treatment by the federal courts in regard to fundamental freedoms should not be allowed to continue.

B. The Eleventh Circuit's Former Overbreadth Jurisprudence Illustrates Its Recent Errors.

While the Eleventh Circuit's recent opinions conflict with the holdings of most other courts as to overbreadth standing, the court's prior case law on this issue was in concert with the other circuits. *See, e.g., National Adver. Co. v. City of Ft. Lauderdale*, 934 F.2d 283 (11th Cir. 1991); *also Granite State Outdoor Adver., Inc. v. City of St. Petersburg*, 348 F.3d 1278 (11th Cir. 2003). In *National Advertising*, the sign company challenged the district court's order granting the city's motion to dismiss. While the city argued that the appellant lacked standing because the ban on billboards was constitutional – the same argument the City made before the district court here – the Eleventh Circuit disagreed. 934 F.2d at 285. Just as here, one of the main defects alleged by the appellant was that the city possessed unlimited discretion in permitting public interest advertising. *Id.* Even though the appellant submitted only applications for billboards, the Eleventh Circuit found that the appellant had standing to bring its facial challenges to the sign ordinance, relying almost exclusively on this Court's opinion in *Metromedia*. *Id.* Thus, when faced with the substantively identical set of circumstances over a decade ago, the Eleventh Circuit reached the opposite conclusion than it did in this case despite the absence of any change in the law of overbreadth.

In *St. Petersburg*, the Eleventh Circuit affirmed standing to make a facial challenge without discussion. 348 F.3d at 1280. The court stated, "[w]e affirm without discussion much of the result reached by the district court." *Id.* In a footnote to that holding, the court noted: "In particular, we note our review of the record confirms the district court's finding that three provisions of the sign ordinance [none of which pertained to the billboard applications at issue] are invalid and severable." *Id.* at n.2. The Eleventh Circuit also afforded Granite State standing to challenge the constitutionality of the permitting procedure but, oddly, it found the lack of time limits acceptable. *Id.* at 1281-82.

A month later in *Granite State Outdoor Advertising, Inc. v. City of Clearwater*, 351 F.3d 1112 (11th Cir. 2003), an Eleventh Circuit panel reached a different conclusion regarding overbreadth standing. Rather than allow the appellant to challenge the permitting procedure of the ordinance in question on the grounds that it lacked safeguards and conveyed discretion, the *Clearwater* panel concluded that, since the sign applications were denied within a reasonable time, the appellant suffered no injury under the licensing provisions and therefore lacked standing to challenge them. 351 F.3d at 1118. In addition, the *Clearwater* panel held that before a litigant can facially challenge a provision on behalf of others he must himself first show a specific injury under that section or subsection of the ordinance. *Id.*

The obvious conflict between *Clearwater* and the circuit's prior decisions came to a head in 2005 in *Tanner Advertising Group, L.L.C. v. Fayette County*, 411 F.3d 1272 (11th Cir. 2005). A different panel of judges found that the "*Clearwater* court overlooked our past precedent, however, when it assumed that under the overbreadth doctrine, a plaintiff can only challenge the one section under which it suffered a concrete injury." 411 F.3d at 1276. The *Tanner*

court held the prior decisions controlling and that the *Clearwater* approach was inconsistent with prior precedent. *Id.* at 1276-77.

The *Tanner* opinion was vacated pending a rehearing en banc to consider the scope of the overbreadth doctrine. 429 F.3d 1012 (11th Cir. 2005). However, because the county enacted a new sign ordinance while the court was considering the case en banc, the court found that the appeal was largely moot and left its determination regarding the overbreadth doctrine for another day. 451 F.3d at 791. Apparently however, the Eleventh Circuit has decided the overbreadth issue *sub silentio* in the wake of *Tanner*, because in its subsequent overbreadth cases such as *Ft. Lauderdale*, *Hoover*, *Cobb County*, and *Pickens County*, the court has applied *Clearwater* and the decision in *CAMP Legal Defense Fund, Inc. v. City of Atlanta*, 451 F.3d at 1257, 1269-77 (11th Cir. 2006).[5] As it is clear that the Eleventh and Fifth Circuits have settled on an overbreadth analysis that is inconsistent with the approach taken by the majority of circuits, review by the Supreme Court is warranted.

II. THE ELEVENTH CIRCUIT'S OPINION IS A DEPARTURE FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS.

Admittedly, as noted by Supreme Court Rule 10, a petition for writ of certiorari is rarely granted when the error asserted is that the opinion below is a departure from the usual and accepted course of judicial proceedings or asserts a misapplication of a properly stated rule of law. However, in this instance, when considering the following arguments in

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[5] Despite the obvious inconsistencies in the analysis regarding the overbreadth doctrine in *Clearwater* and *CAMP*, the Eleventh Circuit has chosen to consider them as a unified body of law.

addition to the conflict between the circuits, review by this Court is warranted.

A. The Eleventh Circuit's Decision To Issue An Unpublished Opinion Was An Abuse Of The Accepted And Usual Judicial Process.

The Eleventh Circuit's decision to issue an unpublished opinion in this matter, and several similar cases, is a departure from the accepted course of judicial proceedings. The Eleventh Circuit has established a policy that "[t]he unlimited proliferation of published opinions is undesirable because it tends to impair the development of the cohesive body of law. To meet this serious problem it is declared to be the basic policy of this court to . . . reduce the volume of published opinions." *See* 11th Cir. I.O.P. 5 to Fed. R. App. P. 36. While the unlimited proliferation of published decisions may be undesirable, given the previously disjointed body of case law with respect to the overbreadth doctrine and sign ordinances within the Eleventh Circuit, the court's decision to issue a truncated opinion with sparse reasoning and authority to support its various conclusions is puzzling.

Even though the Eleventh Circuit deemed the issue of overbreadth standing to be of such great importance as to warrant en banc consideration in *Tanner* – and to put a hold on several appeals in which overbreadth standing was denied – which was ultimately decided on mootness grounds, it issued unpublished decisions in this case and in three similarly situated cases within a span of weeks. *Advantage Adver., L.L.C. v. City of Hoover*, 2006 WL 2344957 (11th Cir. Aug. 11, 2006); *Granite State Outdoor Adver., Inc. v. Cobb County*, 2006 WL 2373528 (11th Cir. Aug. 17, 2006); *Tinsley Media, L.L.C. v. Pickens County*, 2006 WL 2917561 (11th Cir. Oct. 12, 2006). The court's en banc opinion in *Tanner* plainly did not settle the standing issue. Nevertheless, it is clear from the court's opinion in *CAMP*,

and from the subsequent four unpublished opinions, that the Eleventh Circuit has decided this issue *sub silentio.* The Eleventh Circuit's attempt to sweep these four cases "under the rug" by issuing markedly similar unpublished decisions on a very contentious issue of law represents a misuse of unpublished decisions. Given that this Court has recently enunciated a new Federal Rule of Appellate Procedure 32.1, which guards against courts attempting to obscure unpublished decisions, the Eleventh Circuit's attempt to do just that in this instance should be reviewed.

B. The Eleventh Circuit Misapplied The Established Standard For Motions To Dismiss.

Motions to dismiss are "appropriate only if it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Friedl v. City of New York*, 210 F.3d 79, 83 (2d Cir. 2000) (reversing judgment for defendants on a 42 U.S.C. § 1983 claim and quoting *Harris v. City of New York*, 186 F.3d. 243, 250 (2d Cir. 1999)). Furthermore, at the beginning stage of litigation, all of a plaintiff's allegations should be taken as true and all reasonable inferences should have be drawn in its favor. *E.g.*, *Leatherman v. Tarrant County Narcotics Unit*, 507 U.S. 163, 164, 113 S. Ct. 1160, 1161 (1993).

Dismissal is improper "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S. Ct. 99, 102 (1957). Moreover, as this Court recognized in *Lujan*, "[a]t the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we 'presum[e] that general allegations embrace those specific facts that are necessary to support the claim.'" 504 U.S. at 561, 112 S. Ct. at 2137 (quoting *Lujan v. National*

Wildlife Fed'n, 497 U.S. 871, 889, 110 S. Ct. 3177, 3189 (1990)); *also Bischoff v. Osceola County*, 222 F.3d 874, 878 (11th Cir. 2000) ("when standing becomes an issue on a motion to dismiss, general factual allegations of injury resulting from the defendant's conduct may be sufficient to show standing").

Despite this well-established standard, the decisions of the Eleventh Circuit and the district court reveal that no deference was given to Granite State and neither court correctly presumed that the allegations were true even though Granite State's allegations embraced the specific facts necessary to support its claims. (1a-8a; 9a-30a). Moreover, despite the fact that the City attached evidence in support of its Motion to Dismiss, which the district court considered in rendering its decision (12a, n.5, 13a), the district court failed to convert the motion into one for summary judgment. *See Carter v. Stanton*, 405 U.S. 669, 671, 92 S. Ct. 1232, 1234 (1972); *Trustmark Ins. Co. v. Eslu, Inc.*, 299 F.3d 1265, 1267 (11th Cir. 2002) ("Whenever a judge considers matters outside the pleadings in a 12(b)(6) motion, that motion is thereby converted into a Rule 56 Summary Judgment motion"). Granite State appealed these errors, but the Eleventh Circuit completely ignored them in its decision. (1a-8a).

CONCLUSION

The Eleventh Circuit's erroneous interpretation of overbreadth standing has developed from cases, such as this one, brought by outdoor advertising companies. As is usually the case in First Amendment jurisprudence, bad law develops to stymie unpopular speakers. The mistaken rule of law is then applied to other types of speakers, however, as has been illustrated here. The Eleventh and Fifth Circuits' recent standing decisions effectively preclude any viable use of overbreadth standing to remove unconstitutional laws

from the books. The divergence of this new rule of law from the holdings of the Second, Third, Sixth, and Ninth Circuits is stark. Outside of the Eleventh and Fifth Circuits, plaintiffs are still permitted to facially attack unconstitutional speech restrictions. Facial attacks on discretionary permitting schemes and those lacking procedural safeguards are particularly welcomed elsewhere. Such a disparity in access to the corrective authority of the federal courts, particularly in regard to fundamental liberties, should not be allowed to continue. Moreover, given that there have been notable departures from the normal judicial process in this case, including the abusive use of unpublished opinions and misapplication of the proper standard for motions to dismiss, this petition should be granted.

DATED this 16th day of January, 2007.

Respectfully submitted,

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United States Court of Appeals,
Eleventh Circuit.

GRANITE STATE OUTDOOR ADVERTISING, INC.,
Plaintiff-Appellant,
v.
CITY OF FORT LAUDERDALE, FLORIDA,
Defendant-Appellee.

No. 05-12531
Non-Argument Calendar.

Sept. 6, 2006.

G. Franklin Lemond, Jr., Edward Adam Webb, The Webb Law Group, LLC, Atlanta, GA, for Plaintiff-Appellant.

Clark J. Cochran, Jr., Billing Cochran Heath Lyles Mauro & Anderson, P.A., Ft. Lauderdale, FL, for Defendant-Appellee.

Appeal from the United States District Court for the Southern District of Florida. D.C. Docket No. 03-61404-CV-PAS.

Before TJOFLAT, BARKETT and PRYOR, Circuit Judges.
PER CURIAM:

Granite State Outdoor Advertising, Inc., appeals the dismissal of its complaint that alleged the sign ordinance of the City of Fort Lauderdale violates the First Amendment of the United States Constitution. Ft. Lauderdale, Fla., Sign Requirements §§ 47-22.1 to 47.22-11 [hereinafter "Sign Ordinance"]. The district court dismissed the complaint for lack of standing to challenge any provisions of the sign ordinance except one. *See id.* § 47-22.11(E). That provision, section 47-22.11(E), banned all outdoor advertising billboards, and the district court dismissed the

complaint for failure to allege any facts to establish that section 47-22.11(E) was unconstitutional. We affirm.

I. BACKGROUND

On June 30, 2003, Granite State submitted nine sign permit applications to the City of Fort Lauderdale. The plans examiner of the City denied the applications the same day because the City does not permit "outdoor advertising display signs and billboards" under its sign ordinance. *See id.* § 47-22.11(E). The sign ordinance defines "outdoor advertising display" as [a]n off-premises detached outdoor advertising sign consisting of fabricated sign and structure, with posters, pictures, trademark, reading matter, illuminated device, panels, etc., thereon intended to attract the attention of the public to the matter displayed thereon for advertising purposes; such outdoor advertising display sign being commonly referred to as a billboard, poster board, display board, or outdoor advertising board. *Id.* § 47-22.11(A). The sign ordinance prohibits any "[o]utdoor advertising display signs and billboards" within the city limits. *Id.* § 47-22.11(E)(1).

On July 24, 2003, Granite State filed a thirteen-count complaint to challenge the constitutionality of the sign ordinance, both facially and as applied. The district court ruled that Granite State lacked standing to challenge any provision of the sign ordinance except the provision upon which Granite State was denied a permit, section 47-22.11(E). The district court then ruled that section 47-22.11(E) was not unconstitutional and dismissed the complaint.

To support its argument that it had standing to challenge the entire sign ordinance, Granite State relied heavily on *Tanner Adver. Group, L.L.C. v. Fayette County,* 411 F.3d 1272, *vacated* 429 F.3d 1012 (11th Cir.2005). We

vacated the panel decision in *Tanner* and issued a new opinion en banc. *Tanner Adver. Group, L.L.C. v. Fayette County,* 451 F.3d 777 (11th Cir.2006) (en banc). We then ordered the parties to submit supplemental briefs regarding the standing issue in the light of our recent decisions in *Tanner* and *CAMP Legal Def. Fund, Inc. v. City of Atlanta,* 451 F.3d 1257 (11th Cir. 2006).

In its supplemental brief, Granite State challenges several provisions of the ordinance as either grants of unbridled discretion to city officials or unconstitutional prior restraints of speech. Granite State alleges the ordinance grants city officials unbridled discretion because it lacks procedural safeguards to limit the amount of time the City may take to grant or deny a sign permit and to provide a mechanism for judicial review of a denied sign permit application. Granite State also alleges that numerous provisions grant unbridled discretion to City officials to permit the posting of banners at its discretion and determine which flags are approved by the ordinance, Sign Ordinance § 47-22.3(C); decide which events it will sponsor or co-sponsor, *id.* § 47-22.3(C)(1)-(2); determine whether a flag is the authentic flag of a nation, state, or city, *id.* § 47-22.3(C)(5); determine which events are patriotic, memorial, or celebratory in nature, *id.* § 47-22.3(C)(6); decide what companies are public service companies and which of their signs aid service or safety, *id.* § 47-22.7(A)(3); determine which signs are primarily decorative and associated with national, local, or religious holidays, *id.* § 47-22.7(A)(4); determine which institutions are medical, public, charitable, or religious, *id.* § 47-22.7(A)(8); determine which signs are public signs and what messages constitute public notice, *id.* § 47-22.7(A)(12) & (13); determine which organizations are recognized religious orders or historical agencies, *id.* § 47-22.7(A)(14); determine which signs are exempt from regulation because they convey a warning, *id.* § 47-22.7(A)(16); allow the City to remove non-complying signs,

id. § 47-22.6(H); waive landscaping designs for outdoor signs or approve any landscaping plans for outdoor signs, *id.* § 47-22.11(D); determine which signs are architecturally compatible with the principle structure, *id.* § 47-22.3(J)(11); determine which graphics and words are prohibited on message centers because they are similar to signage used for traffic direction and control, *id.* § 47-22.3(J)(12); subject "supergraphics signs" to additional review and approval procedures that do not contain time limits or objective standards, *id.* § 47-22.3(T); determine which signs are appropriate in relation to other signs and structures on the premises and surrounding areas and which signs are consistent with the intent and purpose of the Sign Ordinance, *id.* § 47-22.3(T)(1); determine what sign content can be comprehended by the viewer and what constitutes visual clutter, *id.* § 47-22.3(T)(2); determine whether the size, style, and location of the signs are appropriate to the message and whether the signs complement the building and adjacent buildings, *id.* § 47-22.3(T)(3) & (4); review all signs proposed for the H-1 district of the city, *id.* § 47-22.4(C)(11); and allow government entities to post public service messages unrelated to the premises on message center signs with messages that the City determines are of a public service nature or related to cultural or educational activities, *id.* § 47-22.3(J)(13). Finally, Granite State alleges that it has standing to challenge several provisions of the ordinance that are prior restraints: the exemptions for flags, government signs, holiday decorations, public signs, and government pennants, *id.* § 47-22.7(A); and restrictions on the duration, size, and content of political signs, *id.* § 47-22.5.

II. STANDARD OF REVIEW

"We review standing determinations *de novo.*" *Bochese v. Town of Ponce Inlet,* 405 F.3d 964, 975 (11th Cir.2005). "We review a district court's grant of a motion to

dismiss *de novo,* takings as true the facts as they are alleged in the complaint." *Owens v. Samkle Automotive Inc.,* 425 F.3d 1318, 1320 (11th Cir.2005).

III. DISCUSSION

The complexion of this appeal has been altered dramatically by the order that vacated the panel decision in *Tanner,* 429 F.3d 1012. Before that order was entered, Granite State framed its appeal based on the erroneous notion that the denial of its applications for sign permits enabled it to challenge, under the overbreadth doctrine, *any* provision of the Sign Ordinance as a violation of the First Amendment. As the district court concluded, this argument is foreclosed by our decision in *Granite State Outdoor Advertising v. City of Clearwater,* 351 F.3d 1112, 1119 (11th Cir.2003), as we recently explained in *CAMP,* 451 F.3d at 1270-73. As a result of the final decisions in *Tanner* and *CAMP,* the arguments of Granite State now collapse.

Granite State argues that it has standing to challenge two kinds of provisions of the Sign Ordinance. Granite State argues that it has standing to challenge all provisions of the Sign Ordinance that grant the City unbridled discretion. Granite State also argues that it has standing to challenge sections 47-22.5 and 47-22.7(A) as unconstitutional prior restraints on speech. The problem for Granite State is that it did not allege in its complaint that it intended to engage in any form of expression governed by these provisions of the Sign Ordinance. Granite State does not appeal the conclusion of the district court that section 47.22-11(E), which bans outdoor advertising, is constitutional, and Granite State does not challenge the conclusion of the district court that all of its permits involved only outdoor advertising. We address each argument of Granite State in turn.

A. Granite State Does Not Have Standing to Challenge the Provisions of the Sign Ordinance That Allegedly Grant the City Unbridled Discretion.

The Supreme Court has long held that "when a licensing statute allegedly vests unbridled discretion in a government official over whether to permit or deny expressive activity, one who is subject to the law may challenge it facially without the necessity of first applying for, and being denied, a license." *CAMP,* 451 F.3d at 1274 (quoting *City of Lakewood v. Plain Dealer Publ'g Co.,* 486 U.S. 750, 755-56, 108 S.Ct. 2138, 2143, 100 L.Ed.2d 771 (1988)). The problem for Granite State is that it is not subject to the permitting requirements of the sign ordinance. Sign Ordinance § 47-22.9. Granite State is ineligible for a permit to construct its proposed signs because the sign ordinance bans categorically all outdoor advertising displays. The district court upheld that ban, and Granite State does not challenge that decision on appeal. City officials have no discretion to permit or deny the billboard applications submitted by Granite State.

Granite State also does not have standing to challenge the other provisions of the sign ordinance that it alleges grant unbridled discretion, *see* Sign Ordinance § § 47-22.3(C)(1), (2), (5), (6), -22.7(A)(3), (4), (8), (12), (13), (14), (16), -22.6(H), -22.11(D), -22.3(J)(11), (12), (13), -22.3(T)(1), (2), (3), (4), -22.4(C)(11), -22.7(A), -22.5, because Granite State has not established that its outdoor advertising displays are governed by these provisions. Granite State is not subject to these provisions because outdoor advertising displays are categorically prohibited. The district court did not err when it denied Granite State standing to challenge these provisions.

B. Granite State Does Not Have Standing to Challenge Alleged Prior Restraints That Do Not Affect Granite State.

Granite State cannot establish standing for either of the two prior restraints it challenges on appeal. To establish standing to challenge prior restraints, a party must establish "that either (1) [it was] threatened with prosecution; (2) prosecution is likely; or (3) there is a credible threat of prosecution." *Id.* at 1276 (quoting *Doe v. Pryor,* 344 F.3d 1282, 1287 (11th Cir.2003)). "In a challenge of a prior restraint on speech the plaintiff must establish that the challenged provision pertains to its activity, and not merely that it is 'subject to the law.' " *Id.* (quoting *City of Lakewood,* 486 U.S. at 755-56, 108 S.Ct. at 2143). To survive a motion to dismiss, Granite State has the burden to allege constitutional "injury resulting from the defendant's conduct." *Id.* at 1269 (quoting *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 561, 112 S.Ct. 2130, 2137, 119 L.Ed.2d 351 (1992)). Granite State does not allege facts that establish standing to challenge either of the allegedly unconstitutional prior restraints.

Granite State challenges the provision that regulates political campaign signs, Sign Ordinance § 47-22.5, on the ground that "there is a definite danger the City could apply its deficient political sign restrictions to Granite...." Granite State fails to explain how the regulation of political campaign signs under section 47-22.5 pertains to its activity of outdoor advertising, which is categorically prohibited by the Sign Ordinance, without regard to content. Granite State has not alleged any facts to establish that it would be subject to prosecution under this provision and does not have standing to challenge the restrictions on political signs. *See CAMP,* 451 F.3d at 1276 (denying standing to challenge commercial fees on the ground that party was not a commercial entity).

Granite State also lacks standing to challenge the provision of the sign ordinance that exempts flags, government signs, holiday decorations, public signs, and government pennants from the restrictions of the ordinance. Sign Ordinance § 47-22.7(A). The injury that Granite State suffered from being denied a permit under the categorical ban on billboards would not be redressed by a challenge to this provision. *See Lujan v. Defenders of Wildlife,* 504 U.S. 555, 561, 112 S.Ct. 2130, 2136, 119 L.Ed.2d 351 (1992). Granite State was injured because it was not permitted to erect billboards. Sign Ordinance § 47-22.11(E). If the exemptions that it challenges were struck from the statute as unconstitutional, Granite State still would not be able to erect a billboard. "[T]here would be no point in evaluating [Granite State's] arguments as to those provisions." *Coral Springs Street Sys., Inc. v. City of Sunrise,* 371 F.3d 1320, 1349 (11th Cir.2004). Granite State does not have standing because it cannot establish that its injury will be redressed by a favorable decision.

IV. CONCLUSION

The dismissal of the complaint is

AFFIRMED.

United States District Court,
Southern District of Florida

GRANITE STATE OUTDOOR ADVERTISING, INC.,
Plaintiff,
v.
CITY OF FORT LAUDERDALE, FLORIDA,
Defendant.

No. 03-61404

March 30, 2005.

ORDER GRANTING DEFENDANT CITY OF FORT LAUDERDALE'S MOTION TO DISMISS PLAINTIFF'S COMPLAINT AND REQUEST FOR INJUNCTIVE RELIEF

THIS MATTER is before the Court on Defendant City of Fort Lauderdale, Florida's ("the City") Motion to Dismiss Plaintiff's Complaint and Request for Injunctive Relief [DE-28]. Plaintiff Granite State Outdoor Advertising, Inc. ("Granite State" or "Plaintiff") commenced this action by filing a thirteen count complaint challenging the constitutionality of the City's sign ordinance, both facially applied and as applied to Granite State. Specifically, Granite State contends, *inter alia*, that the sign ordinance lacks the requisite procedural safeguards, impermissibly favors commercial over noncommercial speech, impermissibly favors some noncommercial speech over other noncommercial speech, violates the Equal Protection clause, and violates the Establishment Clause. The City moves to dismiss the Complaint on the grounds that its sign ordinance is a content-neutral, permissible regulation in the interest of promoting the City's aesthetics and the welfare of its citizenry. Upon review of the Motion, the response and reply thereto, the parties' numerous supplemental authorities, and

the relevant portions of the record, the Court finds that Granite State's Complaint must be dismissed because Granite State lacks standing to challenge any provision of the Sign Ordinance other than the provision under which its permit applications were denied, and because Granite State has failed to state a claim of unconstitutionality. Because it is clear that there are no facts that would warrant the requested relief, Defendant's Motion to Dismiss is granted.

I. FACTUAL BACKGROUND

Plaintiff Granite State is in the business of buying and leasing land upon which to erect signs to be used for the dissemination of both commercial and noncommercial speech. *See* Compl. at ¶4. After substantial efforts by Granite State, the owners of interests in several different parcels of real property in the City signed agreements authorizing Granite State to erect and operate a total of nine signs on their property. *Id.* at ¶6. Pursuant to the City's Sign Ordinance, Granite State submitted nine (9) completed sign application packages to the City on June 30, 2003. *Id.* at ¶19. Granite State submitted the applications to the authorized City official, who then referred the applications to the City's Plans Examiner. *Id.* at ¶20. The Plans Examiner advised Granite State that the applications would be denied because Section 47-22.11(E)[1] of the Sign Ordinance prohibits "outdoor advertising display signs and billboards," as defined in the Sign Ordinance.[2] *Id.* at ¶21; *see also* Ex. A, Sect. 47-

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[1] The full text of Section 47-22.11(E) reads as follows: "*Prohibited signs.* The following types of signs are prohibited within the city limits: 1. Outdoor advertising display signs and billboards. 2. Non-point of purchase signs except as expressly permitted herein."

[2] Section 47-22.2(A)(15) defines "outdoor advertising display" as "[a]n off-premise, outdoor advertising sign, such sign being commonly referred to as a billboard, poster board, or outdoor advertising board." *See* Compl., Ex. A at Sect. 47-22.2(A)(15). Section 47-22.11(A) more fully defines "outdoor advertising display" as "an off-premises detached outdoor

22.11(E) at ULDR47:412. Granite State requested a written denial of its applications. *Id.* at ¶22. In compliance with Granite State's request, the City official formally denied the applications by letter dated June 30, 2003 – the same day on which the applications were submitted. *Id.* The letter confirmed what the Plans Examiner orally advised Granite State, namely that the applications were rejected based on the City's prohibition on "outdoor advertising display signs and billboards." *Id.* at ¶23.

Granite State filed the instant action challenging the constitutionality of the City's Sign Ordinance, both facially[3] and as applied to Granite State and to third parties, under the overbreadth doctrine. Specifically, Granite State asserts that the Sign Ordinance is unconstitutional because it: (1) lacks necessary procedural safeguards with respect to its permitting requirements (Count One); (2) grants City officials an impermissible level of discretion to approve or deny signs (Count Two); (3) impermissibly favors some noncommercial speech over other noncommercial speech (Count Three); (4) favors commercial speech over noncommercial speech (Count Four); (5) prohibits far more speech than can be

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advertising sign consisting of fabricated sign and structure, with posters, pictures, trademark, reading matter, illuminated device, panels, etc., thereon intended to attract the attention of the public to the matter displayed thereon for advertising purposes; such outdoor advertising display sign being commonly referred to as a billboard, poster board, display board, or outdoor advertising board."

[3] "A facial challenge, as distinguished from an as-applied challenge, seeks to invalidate a statute or regulation itself." *See Horton v. City of St. Augustine, Fla.*, 272 F.3d 1318, 1329 (11th Cir. 2001). The general rule is that for a facial challenge to proceed, "the challenger must establish that no set of circumstances exists under which the [ordinance] would be valid." *Id.* (citing *United States v. Salerno*, 481 U.S. 739, 745 (1987)). However, "[t]he fact that [an ordinance] might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid." *Id.* This "heavy burden" makes such a facial attack "the most difficult challenge to mount successfully" against an ordinance. *Id* (citing *Salerno*, 481 U.S. at 745).

justified by the City's asserted interests (Count Five); (6) provides no evidence or findings that might justify its onerous restrictions (Count Six); (7) unduly burdens the ability of citizens and property owners to engage in protected First Amendment activity using fundamental means of communication (Count Seven); (8) favors some commercial topics at the expense of others (Count Eight); (9) violates equal protection (Count Nine); (10) violates the Establishment Clause of the First Amendment (Count Ten); (11) is unconstitutional as applied to Granite State (Count Eleven); and (12) is unconstitutional as applied to third parties under the overbreadth doctrine (Count Twelve).[4]

II. DISCUSSION

A. Standard of Review

Federal Rule of Civil Procedure 12(b)(6) provides that dismissal of a claim is appropriate when "it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *Blackstone v. Ala.*, 30 F.3d 117, 120 (11th Cir. 1994) (quoting *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984)). At this stage of the proceedings, the Court must accept Plaintiff's allegations in the Complaint as true and view those allegations in a favorable light to determine whether the Complaint states a claim for relief. *S & Davis Int'l, Inc. v. Republic of Yemen*, 218 F.3d 1292, 1298 (11th Cir. 2000). For purposes of a motion to dismiss,[5] the Court may take judicial notice of

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[4] Count Thirteen does not assert a separate claim, but rather sets forth Granite State's request for relief, in the form of compensatory, presumed, and nominal damages.

[5] Granite State contends that the City's Motion to Dismiss must be denied or converted to a Motion for Summary Judgment under Fed. R. Civ. P. 56 because it relies on factual assertions external to the Complaint. *See* Pl.'s Resp. Mem. at 3. In support of this contention, Granite State points to numerous statements in the City's Motion that it contends constitute

relevant public documents and "facts that are not subject to reasonable dispute because they are capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." *See Sherleigh Associates, LLC v. Windmere-Durable Holdings, Inc.*, 178 F.Supp.2d 1255, 1268 (S.D. Fla. 2000).

In determining whether a plaintiff has stated a claim upon which relief may be granted, a court may consider both the allegations in the complaint and the allegations in the exhibits attached thereto. *See Jackson v. BellSouth Telecomms., Inc.*, 181 F.Supp.2d 1345 (S.D. Fla. 2001); *Landmark Tower Assocs. V. First Nat'l Bank of Chicago*, 439 F.Supp. 195 (S.D. Fla. 1977). Moreover, where an exhibit contradicts an assertion made in the complaint and eliminates any possible claim for relief, dismissal is appropriate. *See Associated Builders, Inc. v. Ala. Power Co.*, 505 F.2d 97 (5th Cir. 1974)[6]; *see also United States ex. rel. Riley v. St. Luke's Episcopal Hosp., et al.*, 335 F.3d 370, 377 (5th Cir. 2004) (noting that where an allegation in the complaint "is contradicted by the contends of an exhibit attached to the pleading, then indeed the exhibit and not the

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"facts" that were not set forth in the pleadings and therefore cannot be considered on a Motion to Dismiss. However, a careful review of Granite State's list reveals that the purported "external facts" consist primarily of the City's characterization of the provisions of the Sign Ordinance (which was attached to the Complaint) and statements concerning the application of legal precedent to similar ordinances. *See id.* at 3-4 (objecting to statements such as "the ordinance ... clearly delineates the standards under which signs subject to permitting requirements are to be allowed" and "municipal permitting requirements of this type have been repeatedly approved against First Amendment attacks.") Such statements are entirely permissible and do not preclude dismissal of the Complaint on a 12(b)(6) motion. The Court will, therefore, consider the City's motion as one for dismissal under Fed. R. Civ. P. 12(b)(6), and not as one for summary judgment pursuant to Rule 56.

[6] The Eleventh Circuit, in *Bonner v. Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (*en banc*), adopted as binding precedent decisions of the former Fifth Circuit rendered prior to October 1, 1981.

allegations controls") (quoting *Simmons v. Peavy-Welsh Lumber Co.*, 113 F.2d 812, 813 (5th Cir.), *cert. denied*, 311 U.S. 685 (1940)).

B. Standing

Although not expressly addressed in the parties' submissions, the Court must begin its analysis by assessing whether Granite State has standing to raise the claims asserted in the Complaint. *See FW/PBS v. Dallas*, 493 U.S. 215, 231 (1990) ("The federal courts are under an independent obligation to examine their own jurisdiction, and standing 'is perhaps the most important of the jurisdictional doctrine.'"). Article III, §2 of the United States Constitution requires that there be a "case" or "controversy" before a federal court may decide a case. The constitutional requirements for a federal court to adjudicate a case are accompanied by prudential requirements. *See Granite State Outdoor Adver., Inc. v. City of Clearwater, Fla.*, 351 F.3d 1112, 1116 (11th Cir. 2003) (citing *Bennett v. Spear*, 520 U.S. 154, 162 (1997)). Together, these constitutional and prudential requirements form the doctrine of standing. *Id.*

The Supreme Court has identified three constitutional requirements for standing, all of which must be satisfied: (1) an injury in fact, meaning an injury that is concrete and particularized, and actual or imminent; (2) a casual connection between the injury and the causal conduct; and (3) a likelihood that the injury will be redressed by a favorable decision. *Id.* (citing *Bennett*, 520 U.S. at 167). The Supreme Court has also identified three prudential standing principles. *Id.* (citing *Allen v. Wright*, 468 U.S. 737, 751 (1984)). Relevant to this case is the principle that a party generally may assert only its own rights and cannot raise the claims of third parties not before the court. *Id.*

Certain exceptions to the prudential standing requirements have been developed. For instance, the "overbreadth doctrine" is an exception that applies in First

Amendment cases involving non-commercial speech and that permits third-party standing when a statute is constitutionally applied to the litigant but might be unconstitutionally applied to third parties not before the court. *Id* (citing *Village of Schaumberg v. Citizens for a Better Env't*, 444 U.S. 620, 634 (1980)). However, the overbreadth doctrine is not an exception to the constitutional standing requirements. *Id.* (citing *Bischoff v. Osceola County, Fla.*, 222 F.3d 874, 884 (11th Cir. 2000)). A plaintiff seeking to make an overbreadth challenge still must show that he suffered an injury in fact, as required under Article III. *Id.* An "injury in fact" requires the plaintiff to "show that he personally has suffered some actual or threatened injury." *Id.* (citing *Valley Forge Christian Coll. V. Americans United for Separation of Church & State*, 454 U.S. 464, 472 (1982)).

Here, Granite State asserts a comprehensive challenge to the constitutionality of the Sign Ordinance and its various provisions. However, the only personal injury that Granite State alleges in the Complaint is that its nine (9) sign applications were denied on June 30, 2003. *See* Compl. at ¶¶19-23. Granite State asserts that the City denied the applications based on its prohibition of "outdoor advertising display signs and billboards," set forth in Section 47-22.11(E) of the Sign Ordinance. *Id.* at ¶¶21, 23; Ex. A at ULDR47:412. Granite State has not alleged any other actual or threatened injury that it personally suffered as a result of the Sign Ordinance. Therefore, in light of *City of Clearwater*, Granite State's standing in the present matter is limited to challenging the constitutionality of the subsection of the Sign Ordinance under which its applications were denied, facially, as applied to it, and as applied to others under the overbreadth doctrine. *See City of Clearwater*, 351 F.3d at 1117. As such, Granite State's constitutional attack against the Sign Ordinance in its entirety fails, and t his Court's constitutional review is limited to the scheme set in place by Section 47-22.11(E) of the Sign Ordinance.

Given this limited focus, Granite State does not have standing to challenge the Sign Ordinance on the grounds that it lacks necessary procedural safeguards, as alleged in Count One of the Complaint. Granite State alleges that the Sign Ordinance is unconstitutional because "[i]t fails ... to circumscribe the time in which government officials must approve or deny requests for permission to [post signs]." *See* Compl. at ¶38. However, as the Eleventh Circuit Court of Appeals concluded in *Granite State Outdoor Adver., Inc. v. City of Clearwater, Fla.*, simply making the argument that the ordinance gives officials an unlimited amount of time to decide whether to grant or deny a permit application "by itself, does not create Article III standing." *See City of Clearwater*, 351 F.3d at 1117. Granite State has not alleged that it was injured by virtue of the absence of such "procedural safeguards." To the contrary, Granite State alleges that its applications were denied, both orally and in writing, *on the same day that they were filed*. *See* Compl. at ¶¶19, 22. Based on these facts set forth in the Complaint, Granite State does not have standing to challenge the alleged absence of procedural safeguards asserted in Count One, and that claim must therefore be dismissed.[7]

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[7] As the Eleventh Circuit recognized in *City of Clearwater* and *Granite State Outdoor Adver., Inc. v. CIty of St. Petersburg, Fla.*,. 348 F.3d 1278 (2003), it is possible that the "City officials could potentially delay the processing of certain permit applications and thereby arbitrarily suppress disfavored speech." *See City of Clearwater*, 351 F.3d at n.7; *see also City of St. Petersburg*, 348 F.3d at 1282. However, the Court cannot "address hypothetical constitutional violations in the abstract." *City of St. Petersburg*, 348 F.3d at 1282. Instead, such "abuse must be dealt with if and when a pattern of unlawful favoritism appears." *Id*. No such pattern appears on the face of the Complaint.

C. Granite State Fails to State a Claim of Unconstitutionality

Limited to the claims that Granite State has standing to assert, this case is about the constitutionality of the City's prohibition of "outdoor advertising display signs and billboards." In connection with this prohibition, the Court must consider whether the Complaint states a claim of unconstitutionality with respect to Section 47-22.11(E) of the Sign Ordinance. Specifically, the Court must address whether the ban on off-premises, outdoor advertising displays: (1) grants City Officials an impermissible level of discretion to approve or deny signs (Count Two); (2) impermissibly favors some noncommercial speech over other noncommercial speech (Count Three); (3) favors commercial over noncommercial speech (Count Four); (4) prohibits more speech than can be justified by the City's asserted interests (Count Five); (6) unduly burdens the ability of citizens and property owners to engage in protected First Amendment activity (Count Seven); (7) favors some commercial topics at the expense of others (Count Eight); (8) violates equal protection (Count Nine); (9) violates the Establishment Clause of the First Amendment (Count Ten); (10) is unconstitutional as applied to Granite State (Count Eleven); or (11) is unconstitutional as applied to third parties under the overbreadth doctrine (Count Twelve). As will be explained further below, the Court finds that, taking as true the allegations of the Complaint and the attached Sign Ordinance, "no relief could be granted under any set of facts that could be proved consistent with th[ose] allegations." *Blackstone*, 30 F.3d at 120.

1. The Content-Neutral Ordinance Does Not Grant City Officials Excessive Discretion

In Count Two, Granite State contends that the Sign Ordinance grants City officials an impermissible level of

discretion to approve or deny signs, and that officials "are granted a virtually limitless discretion in deciding whether permission will be granted or denied to post a sign." *See* Compl. at ¶43. The test for determining whether a permitting ordinance grants a city official excessive discretion depends no whether the ordinance at issue is content-based or content-neutral.[8] *Granite State Outdoor Adver., Inc. v. City of St. Petersburg*, 348 F.3d 1278, 1281 (11th Cir. 2003). In making this distinction, "[t]he government's objective in regulating speech is the controlling consideration." *Id.* (citing *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)). That is, "if the government's reasons for regulating speech have nothing to do with content, then the regulation is content-neutral." *Douglas Outdoor Adver. Of Ga., Inc. v. Cherokee County, Ga.*, No. 1:03-CV-1677-JOF, 2004 WL 1598814, at *3 (N.D. Ga. July 13, 2004) (citing *Ward*, 491 U.S. at 791), *aff'd*, --- F.3d --- (11th Cir. 2005) (TABLE, NO. 04-14146).

In *City of St. Petersburg*, the Court found that the ordinance at issue was content-neutral because its stated purpose was to promote uniformity, preserve aesthetics, and foster safety. *City of St. Petersburg*, 348 F.3d at 1282. Similarly, several district courts in the Eleventh Circuit have found ordinances enacted for these stated reasons to be

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[8] If the ordinance is content-based, then *Freedman v. Maryland*, 380 U.S. 51 (1965), applies. Under *Freedman*, a restraint is only valid if the licensing scheme contains the following specific procedural safeguards: (1) any restraint prior to judicial review can be imposed only for a specified brief period during which the status quo must be maintained; (2) expeditious judicial review of that decision must be available; and (3) the censor must bear the burden of going to court to suppress the speech and must bear the burden of proof once in court. *Id.* at 58-60; *see also FW/PBS*, 493 U.S. at 227. Conversely, where the permitting scheme is content-neutral, the Supreme Court, in *Thomas v. Chicago Park Dist.*, 534 U.S. 316 (2002), concluded that the "extraordinary procedural safeguards" required in *Freedman* are inapplicable. *Thomas*, 534 U.S. at 323-24.

content-neutral.[9] *See Cherokee County*, 2004 WL 1598814 at *4-5; *Advantage Adver., LLC v. City of Alabaster, Ala.*, No. CV-02-CO-02117-S, slip op. at 19 (N.D. Ala. Sept. 29, 2004); *Granite State Outdoor Adver., Inc. v. City of Atlanta, Ga.*, No. 02-CV-3435-ODE, slip op. at 7 (N.D. Ga. July 27, 2004). With respect to the Sign Ordinance at issue, the stated objective of Section 47-22.11 "is to improve the appearance of legally erected billboards and to protect and preserve the appearance, character and value of the surrounding neighborhoods and thereby promote the general welfare by providing for installation and maintenance of landscaping and/or screening and aesthetic qualities, since the city commission finds that the peculiar characteristics and qualities of the city justify regulations and to perpetuate its aesthetic appeal." *See* Compl. at Ex. A, Sect. 47-22.11(B) at ULDR47:412. As in *City of St. Petersburg*, the Sign Ordinance's stated purpose – essentially the preservation of aesthetics – demonstrates its facial content-neutrality as it has "nothing to do with content." *Cherokee County*, 2004 WL 1598814, at *3.

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[9] The Eleventh Circuit has also found justifications such as "preservation of aesthetics" to satisfy the requirements under the *Central Hudson* test. In *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557 (1980), the Supreme Court held that a governmental regulation on commercial speech is only valid if it, *inter alia*: (1) seeks to implement a substantial government interest; (2) directly advances that interest; and (3) reaches no further than necessary to accomplish the given objective. *Id.* at 566. First, the Supreme Court, in *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 507-08 (1981), found that preservation of aesthetics was a substantial government interest. *Id.*; *see also Trinity Outdoor, LLC v. City of Woodstock, Ga.*, No. 1:02-Cv-2846-CAP, slip op. at 29-30 (N.D. Ga. Mar. 8, 2004). Second, the *Metromedia* court concluded that where an ordinance prohibits only off-premise billboards or signs, but permits them on-site, such a regulation does not reach further than necessary to accomplish its objective. *Id.* Finally, the Court finds that given the limited nature of the restriction set forth in Section 47-22.11(E), the regulation does not reach further than necessary to accomplish its goals. Granite State's assertion that the ordinance violates the *Central Hudson* test is, therefore, rejected.

Granite State contends that the Sign Ordinance is content-based because it prescribed permissible content on certain signs, and exempts certain signs from regulation based upon content. As to the former argument, the Sign Ordinance clearly states that it "does not in any manner regulate the written or depicted copy on any individual sign, but only the height, area, location, and other similar aspects of signs and sign structures." *See* Compl., Ex. A, Sect. 47-22.1 at ULDR47:387. As it relates to Section 47-22.11(E) – the only provision that Granite State has standing to challenge – there is no language in the Ordinance itself that prescribes the permissible content on "outdoor advertising display signs" or that invests City officials with any discretion to regulate the content of such signs. Indeed, all "outdoor advertising display signs" – defined in Section 47-22.2(A)(15) as "off-premise, outdoor advertising signs, such signs being commonly referred to as billboards, poster boards, or outdoor advertising boards" – are prohibited within the City limits, without regard to their content. *See* Compl., Ex. A, Section 47-22.11(E) at ULDR47:412. And further, as to Granite State's argument regarding exemptions,[10] this challenge must fail, as the Eleventh Circuit, in *Messer v. City of Douglasville, Ga.*, 975 F.2d 1505 (11th Cir. 1992), explicitly rejected the same challenge. *See Messer*, 975 F.2d at 1512-13 (distinguishing between exemptions from permitting requirements and exemptions from outright prohibitions, and find the former to be permissible); *see also Coral Springs Street Sys., Inc. v. City of Sunrise*, 371 F.3d 1320, 1346-47 (11th Cir. 2004). In any

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[10] In support of this argument, Granite State cited to a February 2003 decision in which Chief Judge Zloch found that the City of Sunrise's sign regulation, which contained many of the same exemptions as those found in the City of Fort Lauderdale's ordinance, was content-based. *See* Pl.'s Resp. Mem. at 7 (citing *Coral Springs Street Sys., Inc. v. City of Sunrise*, No. 01-7951-CIV-ZLOCH, slip op. at 6-11 (S.D. Fla. Feb. 21, 2003)). The Eleventh Circuit has since reversed that decision. *See Coral Springs Street Sys., Inc. v. City of Sunrise*, 371 F.3d 1320 (11th Cir. 2004).

event, the exemptions to which Granite State refers do not arise under Section 47-22.11(E).[11]

The Court recognizes that even a facially content-neutral regulation may not vest public officials with unbridled discretion over permitting issues. *See Burk v. Augusta-Richmond County*, 365 F.3d 1247, 1256 (11th Cir. 2004) (citing *Shuttlesworth v. Birmingham*, 394 U.S. 147, 150-51 (1969)). Time, place, and manner regulations on signage must, therefore, contain "narrowly drawn, reasonable and definite standards." *Id.* (citing *Thomas v. Chicago Park Dist.*, 534 U.S. 316, 342 (2002)). Granite State asserts that the City's Sign Ordinance lacks such clear standards, and cites to numerous provisions that it claims leaves decisions "up to the whim of the administrator." However, the provisions to which Granite State refers have nothing to do with Section 47-22.11(E).[12] As to Section 47-22.11(E), the Court finds that the specific definitions and provisions of the Sign Ordinance provide the necessary standards. *See* Compl., Ex. A. Sect. 47-22.2(A)(15) (defining "Outdoor

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[11] The Court also rejects Granite State's argument that the ordinance is content-based because a City official must review the content of the sign to determine which category it falls into. "The fact that the government official must review the content of the billboard in order to determine which provision of the Ordinance applies does not render the Ordinance content-based." *Cherokee County*, 2004 WL 1598814, at *5 (citing *Hill v. Colorado*, 530 U.S. 703, 719-20)).

[12] Granite State claims that the Sign Ordinance is "rife" with examples of vesting unbridled discretion in City officials. In support, it cites to provisions in which, it claims, City officials are given complete discretion to choose what banners may be posed in the City; select which events to sponsor; determine whether a flag is the "authentic flag" of a nation, state or city; classify events as "patriotic, memorial or celebratory in nature"; define what companies are "public service companies" and which of their signs aid service or safety; and determine which signs are "primarily decorative" and "incidental and customary and commonly associated with any national, local or religious holiday[s]." As discussed above, Granite State has not alleged that it suffered any injury with respect to any of these provisions. Therefore, it cannot challenge the Sign Ordinance on these grounds.

advertising display"); Sect. 47-22.11(A) (defining "Outdoor advertising display signs"). Although the ordinance does not specifically define the term "off-premise,"[13] the absence of such a definition does not vest an impermissible amount of discretion in City officials because they are bound by judicial precedent in defining that term. *See Nat'l Adver. Co. v. City & County of Denver*, 912 F.2d 405, 410-11 (10th Cir. 1990) (citing *Grayned v. City of Rockford*, 408 U.S. 104, 110 (1972)). The Eleventh Circuit has issued several decisions defining and clarifying the scope of "off-premise" signs. *See Southlake Prop. Assocs., Ltd. v. City of Morrow, Ga.*, 112 F.3d 1114, 11147 (11th Cir. 1997) (nothing that whether a sign is offsite "is readily ascertainable"); *see also Messer v. City of Douglasville, Ga.*, 975 F.2d 1505, 1508-09 (11th Cir. 1992). Public officials, therefore, do not have "unbridled discretion" to decide whether an application must be rejected under Sect. 47-22.11(E).[14]

As to Granite State's assertion in Count Six that the City must provide evidence or findings supporting its restrictions, the Court disagrees. Where the justification and reasonableness of a policy is intuitively obvious, detailed

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[13] While the absence of a definition for "off-premise" does not rise to the level of a constitutional infirmity, inclusion of such a definition may eliminate some future confusion in interpreting the ordinance.

[14] The cases to which Granite State cites involves ordinances containing amorphous and undefined standards. *See* Pl.'s Resp. Mem. at 15 (citing ordinances in which officials are given discretion to decide whether messages are "aesthetically pleasing," "controversial," "indecent or immoral"). Such ambiguous terms are entirely different than an ordinance's ban on "off-premise" advertising displays. Unlike considerations as to whether a sign is "controversial," a neutral criterion like "off-premise" does not create a reasonable fear that the content or viewpoint of the speech will be considered as part of the equation. *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 760 (1988) (noting that the Constitution requires the establishment of "neutral criteria to insure that the licensing decision is not based on the content or viewpoint of the speech being considered."); *see also Trinity Outdoor*, No. 1:02-CV-2846-CAP, slip op. at 23 (citing cases).

evidence to support the policy's stated objectives is unnecessary. *See Searcey v. Harris*, 888 F.2d 1314 (11th Cir. 1989). In *Int'l Caucus of Labor Comms. v. City of Montgomery*, 111 F.3d 1548 (11th Cir. 1997), the Eleventh Circuit rejected the notion that a city must present detailed evidence to demonstrate the significance of its stated interest in instituting the ordinance. Instead, the Court found that the City was "entitled to advance its interests by arguments based on appeals to common sense and logic." *Id.* at 1551 (citing *Multimedia Publ'g Co. v. S.C., Inc. v. Greenville-Spartanburg Airport*, 991 F.2d 155, 160 (4th Cir. 1993)); *see also Ackerley Communications of the Northwest, Inc. v. Krochalis*, 108 F.3d 1059, 1097-99 (9th Cir. 1997). Here, the Court finds that the stated objectives and the findings set forth in the Sign Ordinance are sufficient to support the imposed restraints. Based on the foregoing analysis, Counts Two, Five and Six of the Complaint are dismissed.[15]

2. Section 47-22.11(E) of the Sign Ordinance Does Not Favor Commercial Over Noncommercial Speech, Does Not Favor Some Noncommercial Speech Over Other Noncommercial Speech, and Does Not Favor Some Commercial Topics Over Others

Granite State also contends that the Sign Ordinance favors commercial over noncommercial speech (Count Four), favors some noncommercial speech over other

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[15] The Complaint also fails to state a claim as to Count Seven, which asserts that the ordinance "unduly burdens the ability of citizens and property owners to engage in protected First Amendment activity using fundamental means of communication" and "leaves virtually no avenue by which citizens can speak freely." *See* Compl. at ¶65. Because Granite State only has standing to challenge Section 47-22.11(E), this claim is necessary limited to that provision. Granite State cannot, and indeed does not, allege that the specific ban on off-premise outdoor advertising displays leaves speakers with no avenue to speak freely.

noncommercial speech (Count Three), and favors some commercial topics at the expense of others (Count Eight). Because Granite State has standing only as to the provision pertaining to off-premise outdoor advertising signs, the Court limits its analysis to Section 47-22.11(E). As previously discussed, the Court concludes that Section 47-22.11(E) is content-neutral. However, some additional issues warrant discussion here.

First, the Eleventh Circuit has repeatedly recognized the constitutionality of bans on off-premise signs. *See Southlake*, 112 F.3d at 1117-18 (stating that the Constitution allows for the prohibition of offsite signs) (citing *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 512 (1981)); *Messer*, 975 F.2d at 1508-09; *Supersign of Boca Raton, Inc. v. City of Fort Lauderdale*, 766 F.2d 1528, 1531-32 (11th Cir. 1985); *see also Major Media of the Southeast v. City of Raleigh*, 792 F.2d 1269, 1271-73 (4th Cir. 1986). Further, in a recent decision, the Eleventh Circuit, reviewing an ordinance that contained an off-premises ban much like the one in this case, found that the ordinance did not favor commercial over noncommercial speech. *See Coral Springs*, 371 F.3d at 1344. Specifically, the Eleventh Circuit noted that the ordinance expressly allowed noncommercial messages at least as much leeway as commercial ones, as evidenced by its provision stating that "[n]otwithstanding any provisions of the article to the contrary, to the extent this article permits a sign containing commercial copy, it shall permit a non-commercial sign to the same extent." *Id.* (citing *Southlake*, 112 F.3d at 1117). The Eleventh Circuit therefore rejected Coral Springs' contention that the sign ordinance, which banned only off-premise signs, impermissibly favored commercial over noncommercial speech. The same argument applies here.[16] Count Four, therefore, must be dismissed.

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[16] Like the Sign Ordinance in *Coral Springs*, the City's ordinance herein provides that "any sign authorized in this section is allowed to contain

Second, Granite State's allegation that the City's Sign Ordinance "chooses those topics it deems appropriate for public discourse" is not supported, and is in fact contradicted, by the Ordinance itself. Section 47-22.11(E) – the only provision as to which Granite State has standing to assert a constitutional challenge – cannot conceivably be read as selecting certain topics for public discourse. The provision bans all "outdoor advertising display signs and billboards" – which, again, are defined as "off-premise, outdoor advertising signs, such signs being commonly referred to as billboards, poster boards, or outdoor advertising boards" – with no regard to the content of such signs and billboards. Although other provisions of the Sign Ordinance may be subject to constitutional challenge, Granite State's Complaint fails to state a claim with respect to the provision under which its applications were denied. *See Advantage Adver.*, No. 02-CO-02117-S, slip op. at 12, n.5 (finding that the plaintiff lacked standing to challenge sections of ordinance that allegedly favored certain types of speech over others because the plaintiff "did not claim or show it was among the speakers affected by the allegedly differential treatment ..."). Accordingly, Count Three must also be dismissed.

Finally, with regard to Granite State's allegation that the Sign Ordinance favors some commercial topics at the expense of others, Granite State does not have standing to assert this challenge. This allegation, asserted in Count Eight of the Complaint, is based on the contention that "[s]everal sections from the Sign Ordinance ... favor the commercial speech of certain businesses about certain commercial topics while prohibiting other legal and truthful commercial information." *See* Compl. at ¶69. However, Granite State does not – and indeed, cannot, based on the language of the Sign Ordinance – assert that this alleged preference for certain commercial topics arises in the context of the Section

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noncommercial copy in lieu of other copy." *See* Compl., Ex. A, Sect. 47-22.11(F) at ULDR47:412.

47-22.11(E) ban.[17] Because Granite State has not alleged that its applications were denied under Section 47-22.11(E) due to any preference for a certain commercial topic over another, Count Eight is dismissed.

3. Section 47-22.11(E) of the Sign Ordinance Does Not Violate Equal Protection or the Establishment Clause

In Count Nine, Granite State alleges that the Sign Ordinance favors some speakers at the expense of others, and favors messages of certain groups and organizations over others. *See* Compl. at ¶73. In its response to the Motion to Dismiss, Granite State clarifies that its challenge in this regard focuses on the provisions of the Sign Ordinance that relate to government flags; political campaign signs; signs of hotels and motels having restaurants or cocktail lounges; and medical, public, charitable, and religious institutions. *See* Pl.'s Resp. Mem. at 19. None of these provisions have any relation to the prohibition against "outdoor advertising display signs and billboards," and Granite State has not alleged any injury under these provisions. Granite State, therefore, lacks standing to assert this challenge. *City of Clearwater*, 351 F.3d at 1116.

Likewise, Granite State lacks standing to challenge the Sign Ordinance on the basis of the Establishment Clause, as asserted in Count Ten. Granite State alleges that the Sign Ordinance is constitutionally deficient because its provisions favor signs and displays of recognized religious orders and organizations. *Id.* at ¶77. As alleged in the Complaint, this challenge is premised on certain limited exemptions for signs

[17] The factual basis for Count Eight is unclear from the face of the Complaint and from Granite State's response to the Motion to Dismiss. Granite State has not identified any provisions of the Sign Ordinance that evidence favoritism of certain commercial topics over others. In any event, the clear language of the Ordinance demonstrates that Section 47-22.11(E) does not favor any particular commercial topics over another.

associated with religious holidays, for bulletin boards posted by religious institutions, and for symbols and insignia of recognized religious orders. *Id.* at ¶18. There are no provisions relating to religious organizations in connection with Section 47-22.11(E). Indeed, Section 47-22.11(E) bans all off-premise, outdoor advertising display signs and billboards, irrespective of the content of those signs, whether commercial or noncommercial, religious or non-religious. Because Granite State's only alleged injury is under Section 47-22.11(E), and the Establishment Clause challenge does not relate to that provision, Count Ten must be dismissed due to Granite State's lack of standing. *See Advantage Adver.*, No. 02-CO-02117-S, slip op. at 12, n.5.

4. Granite State Has Not Pled Any Facts Demonstrating That Section 47-22.11(E) Is Unconstitutional As It Was Applied to Granite State or to Third Parties

The foregoing analysis focused on whether Section 47-22.11(E) is constitutional on its face, with the Court resolving that question in the affirmative.[18] Granite State's Complaint also contains separate counts asserting that the Sign Ordinance is unconstitutional as applied to Granite State (Count Eleven) and as applied to third parties under the overbreadth doctrine (Count Twelve). Neither of these claims can survive the City's Motion to Dismiss.

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[18] "When a statute is challenged as facially invalid, a court may entertain such a challenge where every application of the challenged provision may create an impermissible risk of suppression of ideas." *Café Erotica of Fla., Inc. v. St. Johns County*, 360 F.3d 1274, 1281 (2004) (citing *Freedman v. Maryland*, 380 U.S. 51, 56-57 (1965)). Because the Court concludes, based on the foregoing analysis, that Section 47-22.11(E) of the ordinance does not create "a realistic danger that the statute itself will significantly compromise recognized First Amendment protections," the Court rejects Granite State's facial challenge.

Granite State's "as applied" challenge to the ordinance raises essentially the same arguments as its facial challenge. Specifically, in Count Twelve, Granite State alleges that the ordinance is unconstitutional as applied to Granite State because, *inter alia*, it restricted the content of the messages to be posted on the signs, disfavored Granite State's requested signs in favor of purely commercial on-site signs, and required Granite State to enter a permitting process that has insufficient safeguards to prevent governmental abuse of free speech rights.[19] *See* Compl. at ¶81. Each of these arguments has been rejected in connection with Granite State's facial challenge, with the Court concluding that Section 47-22.11(E) is a permissible, content-neutral regulation. The Complaint fails to assert any factual allegations indicating that Section 47-22.11(E) has been unconstitutionally applied towards Granite State.

Further, as to Count Twelve, it must first be noted that Granite State only has standing, under the overbreadth doctrine, to challenge Section 47-22.11(E). *See City of Clearwater*, 351 F.3d at 1116 (noting that the overbreadth doctrine is not an exception to the constitutional standing requirements). Granite State has not pled any facts indicating that Section 47-22.11(E) might be unconstitutionally applied to third parties not before the court. *Id.* Further, a reading of Section 47-22.11(E) suggests that even if there were a risk of the "off-premises" ban being unconstitutionally applied to third parties, any such risk is minimal and falls well below

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[19] Granite State also asserts that the ordinance was unconstitutionally applied because it "imposes criminal sanctions and forfeiture of property to enforce compliance with its restrictions." *Id.* First, Granite State does not allege that the City actually imposed any such sanctions or forfeited any of its property. There is no basis, therefore, for Granite State's allegation that the criminal sanctions provision was unconstitutionally applied to it. In any event, the City cited Florida statutes indicating that the City has the authority to impose such penalties for violation of the ordinance, and Granite State, in its Response Memorandum, had no substantive response.

the level of substantiality necessary to satisfy the overbreadth doctrine. *See Weaver v. Bonner*, 3099 F.3d 1312, 1318 (11th Cir. 2002) (finding that the overbreadth doctrine permits the invalidation of a law inhibiting the exercise of First Amendment speech only "if the impermissible applications of the law are substantial when 'judged in relation to the statute's plainly legitimate sweep.'") (quoting *Broadrick v. Okla.*, 413 U.S. 601, 605 (1973)). Counts Eleven and Twelve must therefore be dismissed.[20]

III. Conclusion

For the foregoing reasons, it is hereby

ORDERED that:

(1) Defendant City of Fort Lauderdale, Florida's Motion to Dismiss Plaintiff's Complaint and Request for Injunctive Relief [DE-28] is GRANTED. Plaintiff's Complaint and Request for Injunctive Relief [DE-1] is DISMISSED pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief may be granted;

(2) All pending motions not otherwise ruled upon are DENIED AS MOOT; and

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[20] Finally, because the Court is dismissing all of Granite State's constitutional challenges – either due to lack of standing or on the merits – Count Thirteen, in which Granite State lists the type of damages that it seeks from the City, must likewise be dismissed. Further, to the extent that Granite State seeks injunctive relief, such request is also denied. In order to obtain injunctive relief, Granite State would have to demonstrate, *inter alia*, a likelihood of success on the merits of its case. *See Johnson & Johnson Vision Care, Inc. v. 1-800-Contacts, Inc.*, 299 F.3d 1242, 1246-47) (11th Cir. 2002) (citing *Carillon Imp. Ltd. v. Frank Pesce Int'l Group, Ltd.*, 112 F.3d 1125, 1126 (11th Cir. 1997)). Because the Court finds that the Complaint fails to state a claim, Granite State cannot show a likelihood of success on the merits of its case.

(3) This case is CLOSED.

DONE AND ORDERED in Chambers in Miami, Florida, this 30th day of March, 2005.

Patricia A. Seitz
UNITED STATES DISTRICT JUDGE

cc:
U.S. Magistrate Judge Ted E. Bandstra
All Counsel of Record

United States Court of Appeals,
Eleventh Circuit.

GRANITE STATE OUTDOOR ADVERTISING, INC.,
Plaintiff-Appellant,
v.
CITY OF FORT LAUDERDALE, FLORIDA,
Defendant-Appellee.

No. 05-12531
Non-Argument Calendar.

Oct. 17, 2006.

On Appeal from the United States District Court for the Southern District of Florida

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ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

Before: TJOFLAT, BARKETT and PRYOR, Circuit Judges.

PER CURIAM

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

WILLIAM H. PRYOR
UNITED STATES CIRCUIT JUDGE

ORD-42
(2/05)

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(2)

No. 06-1175

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SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

GRANITE STATE OUTDOOR ADVERTISING, INC.,

Petitioner,

v.

CITY OF FORT LAUDERDALE, FLORIDA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Respondent objects to Petitioner's First Question Presented as framed. Petitioner claims that an issue for certiorari review is "whether overbreadth standing no longer allows a facial challenge to any other provision of a sign ordinance that has not been directly applied to the applicant."

Respondent objects to this formulation of the issue. As set forth in this Response, the overbreadth doctrine has *never* allowed a facial challenge to provisions of a sign ordinance, or any other law, unless a litigant has suffered an injury-in-fact under the particular provision that it seeks to challenge.

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Cited Authorities

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STATUTORY PROVISIONS INVOLVED

In addition to the statutory and constitutional provisions cited by Petitioner, Respondent includes the following:

(1) Article III, Section 2 of the United States Constitution:

> Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of Admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a party;—to Controversies between two or more States;—between a State and Citizens of another State;—between citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

(2) Article III, Section 47-22.11, City of Fort Lauderdale, Code of Ordinances (the "Sign Regulations").

STATEMENT OF THE CASE

I. Overview Of The Case

Petitioner Granite State Outdoor Advertising, Inc. ("Petitioner" or "Granite State") seeks review of a decision by the United States Court of Appeals for the Eleventh Circuit (the "Eleventh Circuit") which affirmed the United States District Court's (the "District Court") dismissal of Petitioner's Complaint and Request for Injunctive Relief (the "Complaint") due to lack of standing. In the proceedings before the District Court and the Eleventh Circuit, Petitioner sought to utilize the limited overbreadth exception to facially challenge the City of Fort Lauderdale, Florida's (the "City" or "Fort Lauderdale") comprehensive sign regulations (the "Sign Regulations"), which

consist of eleven multi-part sections spanning twenty-six pages. The Eleventh Circuit affirmed the District Court's dismissal of the Complaint on the ground that the Petitioner failed to establish that it had standing to facially challenge the City's Sign Regulations in their entirety.

In denying Granite State's attempt to utilize the facial overbreadth doctrine to challenge the entirety of comprehensive Sign Regulations, the Eleventh Circuit continues to follow this Court's long-standing admonition that the overbreadth exception is one of limited application and is "manifestly, strong medicine" to be used "sparingly and only as a last resort." *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973). In so adhering to this Court's precedent, the Eleventh Circuit has recently decided a series of cases which have clarified the indispensability of Article III's constitutional standing requirements and which have put an end to ever-increasing attempts to transform the facial overbreadth doctrine into an instrument of commercial gain under the guise of a First Amendment challenge.

Contrary to Petitioner's assertions, the Eleventh Circuit's recent decisions in *Granite State Outdoor Advertising v. City of Clearwater*, 351 F.3d 1112 (11th Cir. 2003), *cert. denied*, 543 U.S. 813 (2004); *Tanner Adver. Group, L.L.C. v. Fayette County*, 429 F.3d 1012 (11th Cir. 2005); *CAMP Legal Defense Fund, Inc. v. City of Atlanta*, 451 F.3d 1257 (11th Cir. 2006), and the unpublished decision at issue in the Petition, are consistent with the development of this Court's jurisprudence regarding both the constitutional limits on standing as well as the narrow overbreadth exception to the prudential limits on standing. These decisions do not limit the First Amendment rights of third party litigants or curtail the facial overbreadth doctrine. Rather, they provide much needed clarification and guidance to federal courts within the Eleventh Circuit which continue to be confronted with cases, such as the one at issue here, filed for the sole purpose of facially invalidating comprehensive land development regulations with the goal of forcing local governments to permit billboard structures in locations where they are otherwise

prohibited. For these reasons, as more fully set forth below, the Petition for Writ of Certiorari filed by Granite State should be denied.

II. Factual Background

Because the Petition seeks review of the Eleventh Circuit's decision affirming the grant of a motion to dismiss, the facts at issue are limited to those set forth in the Complaint and to the City's Sign Regulations, which were attached as an exhibit to the Complaint.

On June 30, 2003, Granite State submitted nine sign permit applications to the City of Fort Lauderdale. (10a). The applications were referred to the City's Plans Examiner, who advised Granite State that the applications would be denied pursuant to Section 47-22.11(E) of the City's Sign Regulations, which prohibits "outdoor advertising display signs and billboards." (10a). Section 47.22.2(A)(15) defines "outdoor advertising display" as "[a]n off-premise, outdoor advertising sign, such sign being commonly referred to as a billboard, poster board, or outdoor advertising board." (10a, n.2). Granite State requested a written denial of its applications, and the City formally denied the applications by letter dated June 30, 2003, the same date that the applications were submitted. (11a). The June 30, 2003 denial letter confirmed that the applications were rejected based on the City's prohibition on "outdoor advertising display signs and billboards." (11a).

III. Proceedings Below

Granite State subsequently filed a thirteen count Complaint against the City of Fort Lauderdale. (11a-12a). The Complaint was not limited to Section 47-22.11(E) under which the permits were denied. Rather, Granite State sought to challenge the constitutionality of the City's Sign Regulations *in their entirety*, both facially and as applied to Granite State and to third parties, under the overbreadth doctrine. (3a-4a, 11a). Granite State sought, *inter alia*, to challenge the Sign Regulations' alleged lack of procedural safeguards with respect to permitting

requirements, and also alleges that the regulations granted an impermissible level of discretion to City officials to approve or deny signs.

Relying upon the Eleventh Circuit's decision in *Clearwater*, the District Court granted the City's motion to dismiss the Complaint, concluding that Granite State failed to establish that it had standing to facially challenge any provision of the Sign Regulations other than Section 47-22.11(E), under which its permits had actually been denied. (1a, 16a). Citing *Clearwater*, the District Court further held that "Granite State's standing in the present matter is limited to challenging the constitutionality of the subsection of the Sign Ordinance under which its applications were denied, facially, as applied to it, and as applied to others under the overbreadth doctrine." (15a). The District Court concluded that the only section Granite State had standing to challenge, *i.e.* Section 47-22.11(E), was constitutional and survived all constitutional challenges asserted by Granite State. (2a). The District Court noted that "taking as true the allegations of the Complaint and the attached Sign Ordinance, 'no relief could be granted under any set of facts that could be proved consistent with th[ose] allegations.'" (17a) (quoting *Blackstone v. Ala.*, 30 F.3d 117, 120 (11th Cir. 1994)).

Granite State appealed the District Court's order, and in its initial brief, relied upon the Eleventh Circuit's panel decision in *Tanner Adver. Group, L.L.C. v. Fayette County*, 411 F.3d 1272, *vacated by* 429 F.3d 1012 (11th Cir. 2005), which disagreed with (and declined to follow) the Eleventh Circuit's prior decision in *Clearwater*. Subsequent to the parties' initial briefing, however, the Eleventh Circuit vacated *Tanner* and issued a new opinion *en banc*: *Tanner Adver. Group, L.L.C. v. Fayette County*, 451 F.3d 777 (11th Cir. 2006) (en banc). (3a). Shortly thereafter, the Eleventh Circuit issued its decision in *CAMP Legal Def. Fund, Inc. v. City of Atlanta*, 451 F.3d 1257 (11th Cir. 2006), in which it addressed the facial overbreadth doctrine and its relationship to Article III's case or controversy requirement. The Eleventh Circuit then directed the parties in the case to submit

supplemental briefs regarding the standing issue in the light of its *en banc* decision in *Tanner* and its decision in *CAMP*. (3a).

In its supplemental brief, Granite State maintained its challenge to provisions of the Sign Regulations, other than Section 47-22.11(E) under which its permits were denied, on the grounds that these other provisions: (1) lack required procedural safeguards such as a limit to the amount of time the City may take to grant or deny a sign permit and a mechanism for judicial review of a denied sign permit application; or (2) grant unbridled discretion to City officials to permit certain types of signs; or (3) constituted an unlawful prior restraint. The lengthy list of provisions that Petitioner sought to challenge was set out in the Eleventh Circuit's decision. (3a).

In upholding the District Court's dismissal, the Eleventh Circuit noted that before the issuance of the *en banc* decision in *Tanner*, Granite State had based its appeal on the "erroneous notion that the denial of its applications for sign permits enabled it to challenge, under the overbreadth doctrine, *any* provision of the Sign Ordinance as a violation of the First Amendment." (5a) The court noted that the District Court had correctly concluded that such an argument was foreclosed by the Eleventh Circuit's decision in *Clearwater*, and that "[a]s a result of the final decisions in *Tanner* and *CAMP*, the arguments of Granite State now collapse." (5a).

The Eleventh Circuit went on to address the more specific assertions raised by Granite State in its supplemental brief. The court held that Granite State did not have standing to challenge the permitting requirements and procedures because Granite State was ineligible to even apply for a permit to construct outdoor advertising displays which were prohibited and which were never permitted under the Sign Regulations. (6a). The court noted that Granite State was not subject to the wide array of other allegedly unconstitutional provisions that it had cited as granting unbridled discretion, such as those that could be exempted from regulation because they convey a warning,

because it had only submitted applications for outdoor advertising displays. (3a, 6a).

The court further concluded that Granite State did not have standing to challenge alleged prior restraints that did not affect Granite State because it could not meet the burden of establishing that the challenged provision pertained to its activity. (7a) (internal citations omitted). The court noted that in order to survive a motion to dismiss, Granite State had the burden of alleging "injury resulting from the defendant's conduct," and that it had failed to allege facts that established standing to challenge the allegedly unconstitutional prior restraint. (7a) (*quoting Doe v. Pryor*, 344 F.3d 1282, 1287 (11th Cir. 2003)).

Finally, the Eleventh Circuit held that Granite State lacked standing to challenge the provision of the sign ordinance which exempted certain items, such as flags, government signs, and holidays decorations from the exemption provisions. (8a). The court reasoned that the injury that Granite State suffered, *i.e.* from being denied a permit under the categorical ban on billboards, could not be redressed by challenging these exemptions. (8a). The court thus concluded that Granite State did not have standing to challenge these exemptions because "it cannot establish that its injury will be redressed by a favorable decision." (8a). Accordingly, the Eleventh Circuit affirmed the District Court's dismissal of the Complaint. (8a).

REASONS FOR DENYING THE PETITION

I. The Eleventh Circuit's Decision In This Case Does Not Conflict With The Decisions Of This Court Or With The Decisions Of Other Circuit Courts.

Petitioner contends that the *Fort Lauderdale* decision "epitomizes" the conflict among the Circuits with regard to the overbreadth doctrine. (5). The Petition is not limited to other circuit courts, however, but also asserts alleged conflicts with this Court's prior case law. Accordingly, in this Response, the City will first address the general standing requirements, and

the Petitioner's contention that the *Fort Lauderdale* decision, and other recent Eleventh Circuit decisions, curtail the facial overbreadth doctrine and conflict with this Court's decisions on standing and the overbreadth doctrine. Respondent will then address the alleged conflicts with other Circuits.

A. Overview of the Standing Requirements.

Article III, Sec. 2 of the United States Constitution mandates that there be an actual "case" or "controversy" before a federal court may decide a case. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). In ensuring that Article III's case or controversy requirements are met, this Court has identified three *constitutional* requirements for standing: (1) an injury-in-fact; (2) a causal connection between the injury and the conduct; and (3) a likelihood that the injury will be redressed by a favorable decision. *Id.* Collectively, these three criteria are referred to as the "injury-in-fact" requirement. The constitutional injury-in-fact requirement is accompanied by prudential limitations, "which [embody] 'judicially self-imposed limits on the exercise of federal jurisdiction.'" *Elk Grove Unified School Dist. v. Newdow*, 542 U.S. 1, 11-12 (2004) (*quoting Allen v. Wright*, 468 U.S. 737, 751 (1984) (internal citations omitted)). Together, these constitutional and prudential requirements make up the two "strands" of the doctrine of *standing*. *Id.* (citing *Lujan*, 504 U.S. at 559-62).

One prudential limitation is the "general prohibition on a litigant's raising another person's legal rights." *Allen*, 468 U.S. at 751. An exception to this prudential limitation on standing is the overbreadth doctrine which applies in First Amendment cases involving non-commercial speech. The overbreadth doctrine permits a litigant to raise the rights of third parties where there is a *substantial* danger that a statute constitutionally applied to the litigant may be unconstitutionally applied to others not before the court. *See Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973).

B. The *Fort Lauderdale* Decision is Based on the Eleventh Circuit's Recent Decisions in *Clearwater*, *Tanner* and *CAMP*.

The *Fort Lauderdale* decision at issue in the Petition is based on two recent decisions of the Eleventh Circuit which addressed standing in the context of challenges to comprehensive sign regulations: *Clearwater*, decided in 2003, and *Tanner*, decided *en banc* in 2006. In addition, *Fort Lauderdale* is based on the Eleventh Circuit's recent decision in *CAMP* in which it clarified the relationship between the Article III injury-in-fact requirement and facial overbreadth challenges.

Beginning with *Clearwater*, the Eleventh Circuit explicitly held that even a litigant who intends to raise the First Amendment rights of third parties bringing facial overbreadth challenges must *first* demonstrate a cognizable injury-in-fact as part of Article III's case or controversy requirement. In *Clearwater*, Granite State filed an eleven-count complaint against the City of Clearwater, Florida, alleging that its comprehensive sign regulations were unconstitutional on numerous grounds. The complaint was not limited to the validity of Section 3-1806.B, under which Granite State's permits were denied. Instead, Granite State mounted a shotgun-style attack, noting every conceivable constitutional infirmity of Clearwater's comprehensive sign regulations. Although the district court determined that Granite State, which had never appealed the denial of its permits, did *not* have overbreadth standing to challenge the lack of time limits in the appeal provisions of the development review procedures (Article 4), the district court noted that it was "constrained" to find that Granite State did have standing to mount a facial challenge to Article 3, Division 18, which contained numerous other provisions related to sign usage, and not just the provision under which Granite State's permits were denied. *Granite State Outdoor Adver. Co. v. City of Clearwater, Fl.*, 213 F. Supp. 2d 1312, 1322 (M.D. Fla. 2002).

On appeal, the Eleventh Circuit affirmed in part and reversed in part, holding that the district court had "misapplied the overbreadth doctrine" with regard to Article 3, Division 18 and that Granite State lacked standing to facially challenge either Article 3, Division (18) (the sign regulations) or Article 4 (the development review procedures). *Clearwater*, 351 F.3d at 1115, 1117. Noting that the overbreadth doctrine is not an exception to the *constitutional* standing requirements, the Eleventh Circuit held that Granite State's only injury-in-fact resulted from Section 3-1806.B, which contained completely content-neutral height, size, and location requirements, and that Granite State's ability to mount a facial challenge was correspondingly limited to that particular provision. *Id.* at 1117.

Subsequently, the Eleventh Circuit issued its *en banc* decision in *Tanner*. In *Tanner*, an outdoor advertising company applied for eight applications to construct signs that were 50 feet in height and 672 feet in size. 451 F.3d at 781. The applications were denied on the same day pursuant to Section 1-43 of Fayette County, Georgia's sign ordinance, which prohibited off-premise signs more than three feet above ground level and greater than two horizontal feet and two vertical feet in width. *Id.* at 781. Tanner moved to enjoin the enforcement of Section 1-43 and several other provisions of Fayette County's sign ordinance. *Id.* at 781. The district court denied injunctive relief on the ground that Section 1-43 was constitutional and that Tanner lacked standing to challenge the other provisions of the ordinance. *Id.* at 783. A panel of the Eleventh Circuit reversed, disagreeing with its prior *Clearwater* decision and concluding that Tanner had standing under the overbreadth doctrine to challenge the other provisions of the ordinance. *Id.* at 780. The Eleventh Circuit granted a petition for rehearing *en banc* and vacated the panel decision. 429 F.3d 1012 (2006). On rehearing *en banc* the Eleventh Circuit upheld the district court's decision that Tanner lacked standing to challenge provisions of the ordinance that were not applicable to it. Citing *Clearwater*, the *en banc* court noted that a Plaintiff must meet

each of the three injury-in-fact requirements (*id.* at 791), and further noted that each element of the constitutional injury requirements are "indispensable." *Id.* (citing *Lujan*, 504 U.S. at 561).

Shortly after issuance of *Tanner en banc*, the Eleventh Circuit issued its decision in *CAMP* to clarify the proper use of the facial overbreadth doctrine. 451 F.3d 1257. In *CAMP*, the plaintiff sought to challenge numerous provisions of the City of Atlanta's festival ordinance which required organizations to acquire permits prior to holding an outdoor festival in the City. Plaintiff contended that a party who suffered injury under one provision of the Ordinance had standing to challenge any provision of the ordinance. 451 F.3d at 1270. The Eleventh Circuit rejected this argument, clarifying that "[t]he overbreadth doctrine *does not relieve a plaintiff of the burden to prove constitutional standing*, which requires that 'the plaintiff himself has suffered some threatened or actual injury. . . .'" *Id.* (citing *Warth v. Seldin*, 422 U.S. 490, 499 (1975)). The court concluded that "[u]nder the overbreadth doctrine, CAMP may mount a faical challenge—as opposed to an as-applied challenge—to provisions of the Festivals ordinance *that affect its activities.*" *Id.* (emphasis added).

The *Fort Lauderdale* decision, which is the subject of the current Petition, follows *Clearwater*, *Tanner*, and *CAMP*. In *Fort Lauderdale*, the Eleventh Circuit *did not* hold that Granite State was prohibited from mounting a facial overbreadth challenge or that it could not under any circumstances raise the rights of third-party litigants. Rather, consistent with its prior decisions, the court upheld that the District Court's determination that Granite State could mount a facial overbreadth challenge only to those provisions of the Sign Regulations that "affect its activities" (*i.e.* 47-22.11(E)).

C. The *Fort Lauderdale* Decision Does Not Conflict with this Court's Prior Decisions with Regard to the Injury-in-Fact Requirement or the Facial Overbreadth Doctrine.

In its Petition, Granite State ignores its failure to establish the constitutionally required injury-in-fact, and instead attempts to cast the Eleventh Circuit's decision as one which places the overbreadth doctrine "under siege." (9). Contrary to Petitioner's assertion that the *Fort Lauderdale* decision, as well as the three prior decisions upon which it is based, have somehow eviscerated a First Amendment speaker's right to mount a facial overbreadth challenge, these decisions are entirely in accordance with this Court's prior decisional law.

1. The *Fort Lauderdale* decision is consistent with this Court's decisions with regard to the constitutionally required injury-in-fact.

Granite State begins, in Section I of the Petition, with the fundamentally erroneous assertion that a plaintiff need not establish the *constitutionally* mandated injury-in-fact in order to bring a facial overbreadth challenge. According to Granite State:

> [w]hile a plaintiff must generally demonstrate that it has suffered an injury-in-fact . . . the Supreme Court created an exception to these general rules of standing . . . where this Court noted that the very existence of some broadly written statutes may have such a deterrent effect on free expression that they should be subject to challenge even by a party whose own conduct may be unprotected.

(5). This assertion is simply incorrect. Respondent is unaware of any decision by this Court which holds that *constitutional* requirements may be ignored or waived. Petitioner conflates the prudential limitations on standing, which may be relaxed under certain limited circumstances, with the constitutional injury-in-fact requirement, which must always be met.

This Court has consistently held that although the judicially-created prudential requirements on standing may be relaxed under some circumstances, the requirements of Article III can never be waived or ignored, and that a plaintiff seeking to make an overbreadth challenge must first demonstrate an *injury-in-fact*. The overbreadth doctrine, which is judicially created, cannot alter the requirements of standing, under Article III, because the Judiciary *cannot abrogate the Constitution. Gladstone Realators v. Village of Bellwood*, 441 U.S. 91, 100 (1979). *See also e.g. Virginia v. American Bookseller Ass'n*, 484 U.S. 383, 392-93 (1988) (noting that the injury-in-fact requirement had been met where law was "aimed directly at plaintiffs" who would have to take "significant and costly compliance measures or risk criminal prosecution). In discussing various exceptions to the prudential limitation on standing, this Court has noted that "[o]f course, Art. III's requirement remains: the plaintiff still must allege a distinct and palpable injury to himself, even if it is an injury shared by a large class of other possible litigants." *Warth*, 422 U.S. at 501.

This Court's decision in *Secretary of State of Md. v. Joseph H. Munson Co., Inc.*, 467 U.S. 947 (1984) illustrates the indispensability of the injury-in-fact requirement. In *Munson*, the Court allowed a for-profit company to facially challenge a Maryland statute that prohibited charitable organizations from paying or agreeing to pay expenses exceeding 25% of an amount raised in a fundraising activity. This Court reiterated, however, that "[t]he first element of the standing inquiry that Munson must satisfy in this Court is the "case" or "controversy" requirement of Art. III. . . ." *Id.* at 954. This Court concluded that Munson had suffered an injury-in-fact because its contracts called for payment in excess of 25% of the funds raised for a given event and subjected it to civil restraint and criminal penalty under the statute. *Id.* at 954-55. Although Munson, as a for-profit company (non-charity), did not suffer a *constitutional* violation pursuant to the First Amendment, this Court held that Munson could raise the First Amendment rights of third parties

not before the court under the overbreadth doctrine because it had met the necessary injury-in-fact requirement: "[t]he crucial issues are whether Munson satisfies the requirement of 'injury-in-fact,' and whether it can be expected satisfactorily to frame the issues in the case." *Id.* at 958.

Accordingly, this Court has recognized that the injury-in-fact requirement is a necessary prerequisite to any facial overbreadth challenge, and *Fort Lauderdale* is entirely consistent with this Court's prior decisional law with regard to Article III standing requirements.

2. *Fort Lauderdale* is also consistent with this Court's prior decisions regarding proper application of the overbreadth doctrine.

This Court has recognized that "[a]pplication of the overbreadth doctrine is, manifestly, strong medicine" which has been "employed by the Court sparingly and only as a last resort." *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973). Five months prior to the Eleventh Circuit's *Clearwater* decision, this Court issued its opinion in *Virginia v. Hicks*, 539 U.S. 113 (2003), in which this Court admonished that "there are substantial social costs created by the overbreadth doctrine when it blocks application of a law to constitutionally unprotected speech, or especially, to constitutionally unprotected conduct." *Id.* at 119. This Court noted that even the "chilling effect" of a law which is actually overbroad, "cannot justify prohibiting all enforcement of that law—particularly a law that reflects 'legitimate state interests in maintaining comprehensive controls over harmful, constitutionally unprotected conduct.'" *Id.* This Court went on to re-affirm that a law's overbroad application to protected speech must be "substantial" before it is invalidated:

> To ensure that these costs do not swallow the social benefits of declaring a law "overbroad," we have insisted that a law's application to protected speech be "substantial," not only in an absolute sense, but also relative to the scope of the law's plainly

> legitimate applications before applying the "strong medicine" of overbreadth invalidation.

Id. at 119-120 (internal citations omitted). *Hicks* is consistent with this Court's prior decisions with regard to facial overbreadth and the necessity that a statute be "substantially overbroad." *See, e.g., Broadrick*, 413 U.S. at 613; *New York v. Ferber*, 458 U.S. 747, 773 (1982). Moreover, as noted by the Eleventh Circuit in *CAMP*, "[t]he Supreme Court has refused to consider challenges to provisions of a statute where '[e]xamination of the record reveals that no party has standing to challenge the provisions.'" *CAMP*, 451 F.3d at 1273 (citing *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 233 (1990).

Hicks and other recent decisions of this Court also reveal an increased recognition that as-applied challenges are the normal and appropriate means of vindicating constitutional violations, and that facial overbreadth challenges are to be reserved for *extreme circumstances*. *See, e.g., Hicks*, 539 U.S. at 124 (noting that applications of loitering policy that violate the First Amendment can be remedied through as-applied challenges); *Thomas v. Chicago Park Dist.*, 534 U.S. 316, 325 (2002) (holding that provision of content-neutral permitting scheme which might allow park district to waive permit requirements would be an abuse that must be dealt with "if and when a pattern of unlawful favoritism appears. . . ."); *City of Littleton, Colo. v. Z.J. Gifts D-4, L.L.C.*, 541 U.S. 774, 784 (2004) (noting that individuals denied licenses "remain free to raise special problems of undue delay in individual cases as the ordinance is applied").

In seeking review of the *Fort Lauderdale* decision, which is based upon *Clearwater*, *Tanner*, and *CAMP*, Granite State contends that if it has standing to assert a facial challenge under Section 47-22(E), it must necessarily have standing to assert a facial challenge under the extensive remaining provisions of the Sign Regulations. Granite State bases its contention that it may challenge the City's entire sign permitting scheme on *Broadrick* and *Members of City Council of Los Angeles v.*

Taxpayer's for Vincent, 466 U.S. 789 (1984), as well as an over-extended reading of footnote 11 to this Court's plurality decision in *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981).

Respondent does not dispute that *Broadrick* and *Taxpayer's for Vincent* are significant decisions applying the overbreadth doctrine in the First Amendment context. In asserting that it may challenge every provision of Fort Lauderdale's Sign Regulations, however, Granite State misapplies and overextends the overbreadth doctrine, and in fact, does damage to it by confusing its proper application. Additionally, Petitioner's assertion of an alleged conflict with *Metromedia* is similarly erroneous. In *Metromedia*, a plurality of this Court held that an outdoor advertising company, whose interests were *primarily* commercial, could challenge those aspects of the ordinance which exempted certain noncommercial speech. 453 U.S. at 504, & n. 11.

Petitioner's assertion of conflict relies upon the often mis-cited footnote 11 in the *Metromedia* plurality decision which states as follows: "[w]e have never held that one with a 'commercial interest' in speech also cannot challenge the facial validity of a statute on the grounds of its substantial infringement of the First Amendment interests of others." *Id.* at 504, n. 11. This footnote was pure dictum as the plurality had already determined that Metromedia could challenge all aspects of the ordinance "in their own right." *Id.* at 504. Petitioner in this case and many other outdoor advertising companies have attempted to extrapolate from footnote 11 a judicial mandate that a plaintiff may challenge any portion of a land development regulation or a zoning ordinance if any particular section of that regulation implicates the First Amendment. Such an extensive interpretation is nonsensical as aptly noted by one District Judge in the Eleventh Circuit:

> It defies logic and all reasonable interpretation of the language of *Metromedia* . . . where the Supreme Court has simply said that it has not yet determined that an entity with a commercial interest can *never*

> raise a First Amendment challenge to the facial validity of a statute, . . . [to assume] a legal principle that even a slight (*de minimis*) interest in noncommercial speech by a overwhelmingly proportionate commercial speech billboard company [gives] it the right to take up the sword on behalf of noncommercial advertisers. . . .

National Advertising Co. v. City of Miami, 287 F. Supp. 2d 1349, 1362 (S.D. Fla. 2003), *rev'd on other grounds by* 402 F.3d 1329 (11th Cir. 2005), *cert. denied*, 126 S. Ct. 1318 (2006). The footnote reference in *Metromedia* must also be read in light of this Court's pre-existing precedent. *See Warth*, 422 U.S. at 499 (noting that "[a] federal court's jurisdiction therefore can be invoked only when the Plaintiff himself has suffered 'some threatened or actual injury resulting from the putatively illegal action.'") (internal citations omitted).

Moreover, such an extension of the overbreadth doctrine to comprehensive Sign Regulations, particularly where the applicant is affected only by a limited portion of those regulations, is contrary to the history of the doctrine's development. Petitioner correctly states that the overbreadth doctrine developed as a means to challenge laws that, by their very generalized nature, swept constitutionally protected activity within their prohibitions. Vagrancy and loitering ordinances are primary examples. *See, e.g., Broadrick*, 413 U.S. at 602 (law generally restricting political activities of state civil service employees); *Thornhill v. State of Alabama*, 310 U.S. 88 (1940) (law prohibiting loitering and picketing). Such statutes, however, traditionally applied to one type of conduct or category of conduct which was defined in such an overly broad way that it swept within its grasp certain constitutionally protected conduct. For this reason, the overbreadth doctrine allowed those who had not been *constitutionally* injured (for instance, one validly arrested for loitering), to mount a facial attack on the statute on behalf of third parties whose First Amendment rights might be inhibited by the potentially broad scope of the regulation at issue.

In contrast, municipal land development regulations and zoning regulations contain numerous separate sections and provisions with very specific applications. In that respect, they are the antithesis of the type of law historically subject to overbreadth challenges. Where those laws were general attempts to prohibit conduct, but do so in an overly broad manner, the type of land development regulations at issue in this case are carefully crafted and represent efforts to regulate all kinds of *structures*.[1]

Moreover, contrary to Petitioner's assertion, this case does not fall within that category of cases which involves the vesting of unbridled discretion to officials. (8). Petitioner cites *City of City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 755-56 (1988) in an attempt to cast the Sign Regulation at issue into the form of a *licensing scheme* under which a plaintiff need not apply for a *permit* prior to bringing a facial challenge. Even in such cases, the litigant must establish an injury-in-fact. Nonetheless, *Fort Lauderdale* is distinguishable from a line of this Court's decisions, including *City of Lakewood* and *Forsyth County, Ga. v. Nationalist Movement*, 505 U.S. 123 (1992), in which the Court determined that litigants may facially challenge licensing schemes which vest the decision-maker with unbridled discretion to restrict First Amendment activity. In the past, this Court has held that a facial challenge was proper where the regulations at issue targeted protected activity such as assembly and parades (*Forsyth*) and permitting for placement of news racks (*Lakewood*). However, in *Lakewood* this Court clarified that not every law which grants discretion to a decision maker is subject to a facial overbreadth challenge. Rather, "[t]he law

1. This Court has further noted in *Hicks* that "rarely if ever will an overbreadth challenge succeed against a law or regulation that is not specifically addressed to speech. . . ." 539 U.S. at 124. Rather, as the Court noted, in such cases, applications of the policy at issue that violate the First Amendment may be remedied "through as-applied" litigation. *Id.* While sign regulations have some impact on expressive activity, the regulation of property and structures upon which advertising is placed is a matter of land use law to which judicial deference is given.

must have a close enough nexus to expression, or to conduct commonly associated with expression, to pose a real and substantial threat of the identified censorship risks." *Lakewood*, 486 U.S at 759. As an example, this Court stated in *Lakewood* that a law granting discretion in the issuance of *building permits* would not pose the danger of censorship, noting that "such laws provide too blunt a censorship instrument to warrant judicial intervention prior to an allegation of actual misuse." *Id.* at 761.

Significantly, in both *Lakewood* and *Forsyth*, the plaintiff was directly impacted by a regulation which, due to the discretion vested in decision-makers, had the potential to chill First Amendment activity even if it did not chill the First Amendment activity of the Plaintiff. In this case, Petitioner has suffered no injury-in-fact from any provision of the Sign Regulations which allegedly implicates the First Amendment or vests undue discretion. Rather, the provision of the Code under which Petitioner's permits were denied pursuant to the City's prohibition of billboards.

D. The *Fort Lauderdale* Decision is Not in Conflict with Decisions of Other Circuits.

Petitioner contends that "parties asserting First Amendment challenges in the Eleventh and Fifth Circuits are now denied standing to challenge speech restrictions under the overbreadth doctrine while such challenges are allowed elsewhere" and that, as a result, there is a "disparity in treatment by federal courts. . . ." (13). Specifically, Petitioner contends that *Fort Lauderdale* conflicts with decisions of the Sixth, Ninth and Second Circuit Courts of Appeal.[2] However a review of

2. Petitioner names these circuits, but then also cites decisions from the Fourth and First Circuits as well. Petitioner cites *Ackerley Communications of Massachusetts, Inc. v. City of Cambridge*, 88 F.3d 33, 34 (1st Cir. 1996), in which a billboard company which displayed 46 *non-commercial* signs brought an action to preclude enforcement of an order directing it to take down its signs. The plaintiff in *Ackerley* had

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recent standing decisions reveals that *every* United States Circuit Court which has considered the issue, *including the Second, Third, and Ninth, which Petitioner cites to be in conflict with the Eleventh and Fifth Circuits*, has recognized that the constitutionally mandated injury-in-fact requirements are separate and distinct from the facial overbreadth exception to the prudential limitations on standing, and that even a party seeking to mount a facial overbreadth challenge must demonstrate that he has suffered injury under the challenged provision. *See Farrell v. Burke*, 449 F.3d 470, 498-99 (2d Cir. 2006); *Service Employees Int'l Union, Local 3 v. Municipality of Mt. Lebanon*, 446 F.3d 419, 424-25 (3d Cir. 2006); *Peterson v. National Telecommunications and Information Administration*, 478 F.3d 626, 633-34 (4th Cir. 2007); *Harp Advertising Illinois, Inc. v. Village of Chicago Ridge, Illinois*, 9 F.3d 1290, 1292 (7th Cir. 1993); *Advantage Media, L.L.C. v. City of Eden Prairie*, 456 F.3d 793, 798-99 (8th Cir. 2006); *4805 Convoy, Inc. v. City of San Diego*, 183 F.3d 1108, 1111-13 (9th Cir. 1999); *National Council for Improved Health v. Donna Shalala*, 122 F.3d 878, 882-83 (10th Cir. 1997). Moreover, a

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substantial non-commercial speech interests and was ordered to take down already-standing signs. The plaintiff thus suffered a direct injury and was arguably affected by the alleged constitutional infirmity — that the ordinance impermissibly protected non-commercial on-premises signs but did not protect non-commercial off-premise signs.

Petitioner also cites *Giovanni Carandola, Ltd. v. Bason*, 303 F.3d 507 (4th Cir. 2002) as well as the Sixth Circuit's decision in *Déjà vu of Nashville, Inc. v. Metropolitan Government of Nashville and Davidson County, Tennessee*, 274 F.3d 377 (6th Cir. 2002). Both decisions address challenges to adult entertainment licensing schemes, and as such, are inapplicable and do not conflict with *Fort Lauderdale*. The more stringent requirements for licensing schemes do not apply to content-neutral *permitting* schemes which do not target any particular viewpoint or message. *See Thomas.*, 534 U.S. at 320-323 (2002).

review of the cases cited in the Petition does not reveal the type of conflict that warrants review by this Court.[3]

Petitioner cites *R.S.W.W., Inc. v. City of Keego Harbor*, 397 F.3d 427, 426-37 (6th Cir. 2005), in support if an alleged conflict. *R.S.W.W.* does not conflict with *Fort Lauderdale* and is clearly distinguishable. In *R.S.W.W.*, the plaintiff, owners of a microbrewery, had applied to change the name on its sign, and the City had postponed consideration of its application. *Id.* at 436-37. The plaintiff sought to challenge the statute on the ground that it granted overly broad licensing discretion which permitted the city to withhold approval of its request to change the name on its sign. *Id.* at 436. The Sixth Circuit Court of Appeals held that it was irrelevant that the city had not yet denied the permit but only delayed consideration of the plaintiff's request and held that the district court had erred in determining that the plaintiff had no standing to challenge the ordinance. *Id.* at 437. *R.S.W.W.* is clearly distinguishable because the plaintiff had applied for a permitted action under the ordinance, and the City had specifically and purposely delayed in considering its permit application.

Additionally, contrary to Petitioner's assertion, the Sixth Circuit's binding case law with regard to standing is entirely consistent with the Eleventh Circuit. On January 22, 2007, the Sixth Circuit Court of Appeals issued its decision in *Prime Media, Inc. v. Brentwood*, 474 F.3d 332, in which it addressed the issue of standing in connection with an attempt to facially challenge an entire municipal sign ordinance. In *Prime Media*, the plaintiff's applications to construct billboards were denied under the City's size, height, and location requirements, and the plaintiff sought to facially challenge numerous other provisions of the regulations under the overbreadth doctrine.

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3. Although Respondent maintains that many of the circuit court decisions cited by Petitioner were incorrectly decided and were not in accord with this Court's prior decisional law, these cases are distinguishable and are not a source of confusion with regard to the Eleventh Circuit's recent standing decisions, including *Fort Lauderdale*.

Id. at 334. Citing this Court's decisions in *Am. Booksellers Ass'n*, 484 U.S. 383 (1988), and *Munson*, the Sixth Circuit concluded that Prime Media did not have standing to challenge any other provisions of the sign regulations, noting that "Prime Media's standing with regard to the size and height requirements does not magically carry over to allow it to litigate other independent provision of the ordinance without a separate showing of an actual injury under those provisions." *Id.* at 338. The court went on to cite, with approval, the Eleventh Circuit's decision in *CAMP*, noting that it "agree[d] with the Eleventh Circuit's approach to this issue, as it follows directly from the Supreme Court's analysis in FW/PBS." *Id.* at 339. Similar to the Eleventh Circuit's conclusion in *Fort Lauderdale*, the Sixth Circuit noted that Prime Media had not demonstrated that it had suffered an injury that would be redressed by a favorable decision. *Id.* at 340.

Petitioner also cites the Third Circuit's decision in *Peachlum v. City of York, Pa.* 333 F.3d 429 (3d Cir. 2003), in support of an alleged conflict. The language cited by Petitioner, however, does no more than recite traditional overbreadth principles as set forth in *Broadrick*. It does not address the relationship between overbreadth and the Article III standing requirements. In *Peachlum*, the Third Circuit concluded that a citizen's challenge to a local ordinance, which prohibited the plaintiff from displaying a yard sign containing an illuminated religious message was ripe for review. *Id.* at 431-32, 435. The court held that the plaintiff could facially challenge the ordinance even though no final administrative decision had been reached with respect to an enforcement action taken against her. *Id.* at 438. Thus, the *Peachlum* decision addressed the ripeness doctrine, and in contrast to *Fort Lauderdale*, involved a private citizen's ability to display a religious message on her own property.

It should also be noted that *Peachlum* was followed by the Third Circuit's 2006 decision in *Service Employees Int'l Union, Local 3 v. Municipality of Mt. Lebanon* in which the court addressed the necessity of the Article III injury-in-fact

requirement. 446 F.3d at 424-25. The Third Circuit concluded that the plaintiff did not have standing to challenge solicitation permitting and canvassing requirements of an ordinance even though they were set forth in the same ordinance under which the plaintiff had suffered injury:

> SEIU argues that we should apply the "relaxed standing principles" used in the First Amendment overbreadth context. But, as noted, those principles are only applicable to prudential standing requirements, *not the constitutional requirements of Article III jurisdiction. We are not free to hear a party's facial challenge to a municipal regulation that is wholly inapplicable the party.* While the canvassing registration requirement and the solicitation permitting requirements are both found within the ordinance, they clearly establish distinct and independent requirements for their application. Overbreadth doctrine effectively allows a party to challenge separate and hypothetical applications of a regulation *only when an otherwise valid application of that same regulation cause the party injury-in-fact. It does not allow a party to challenge a regulation that is wholly inapplicable to the party, regardless of the regulation's location in the statute books.*

Id. (emphasis added). The Third Circuit further noted that its prior decision in *Peachlum*, in no way "relaxed the constitutional requirements for standing." *Id.* at 424, n.2.

The Second Circuit's decision in *Lamar Advertising of Penn, LLC v. Town of Orchard Park*, 356 F.3d 365 (2d Cir. 2004) is also fails to create a conflict. Unlike Granite State, Lamar set out in its complaint that it was interested in building signs of different sizes, including fifty (50) signs measuring 72-square feet, which would be a size allowed in Orchard Park's

industrial zones.[4] *Id.* at 324. In contrast, Granite State sought permission to construct billboards which were clearly prohibited and did not allege that it sought to erect any of the permitted sign types within the City of Fort Lauderdale. Additionally, subsequent to its decisions in *Lamar* and *National Advertising Co. v. Town of Babylon*, 900 F.2d 551 (2d Cir. 1990) the Second Circuit has subsequently clarified that even though a facial overbreadth plaintiff must establish that the "challenged regulation injured his or her First Amendment interests," the litigant must still satisfy the Article III injury-in-fact requirement. *Farrell*, 449 F.3d at 498-99 (citing *Munson*, 467 U.S. at 958).

Finally, the *Fort Lauderdale* decision does not conflict with the Ninth Circuit's decision in *Desert Outdoor Advertising, Inc. v. City of Moreno Valley*, 103 F.3d 814 (9th Cir. 1996). In *Desert Outdoor*, the Ninth Circuit specifically addressed whether the plaintiff had suffered an actual injury-in-fact. In determining that the plaintiff had met the Article III "case" or "controversy" requirements, the court noted that the plaintiff had suffered an injury because the City had brought an enforcement action in order to compel the removal of signs. *Id.* at 818. *Desert Outdoor* is distinct from the circumstances present in *Fort Lauderdale*. The *Desert Outdoor* court was addressing whether the plaintiff needed to apply for a permit to challenge the substantive portion of the sign regulations when it had already been subject to an enforcement action under those same regulations. *Id.* at 818. Moreover, unlike *Fort Lauderdale*, there was no question that Desert Outdoor had suffered injury due to the enforcement of the ordinance (and the forced removal of its signs). *Id.* Desert Outdoor was directly impacted, and thus arguably suffered injury, from a permitting procedure that vested officials with discretion to prohibit any display with a "harmful effect upon

4. The Second Circuit's decision in *National Advertising Co. v. Town of Babylon*, 900 F.2d 551 (2d Cir. 1990) is similarly distinguishable. In *Babylon*, the Second Circuit spoke in terms of the "speech" that the appellant municipalities sought to "restrict." 900 F.2d at 555. The Second Circuit determined without discussion that the lower court was correct in determining that National had standing to challenge the ordinances.

the health or welfare of the general public." *Id.* at 817. In contrast, Granite State's applications were denied on the basis of a content-neutral, general prohibition of billboards. It was not subject to the type of discretion which impacted Desert Outdoor.

Moreover, in a subsequent 1999 decision, *4805 Convoy, Inc. v. City of San Diego*, the Ninth Circuit clarified that a litigant may not challenge a provision of an ordinance unless it suffers an injury-in-fact from that *particular* provision. In *Convoy*, the Ninth Circuit concluded that the plaintiff had standing to challenge the suspension and revocation provisions of a nude dancing ordinance but did not have standing to challenge the licensing provision of the same ordinance. 183 F.3d at 1111. The court held that the overbreadth exception to the prudential limits on standing "does not affect the rigid constitutional requirement that plaintiffs must demonstrate an injury-in-fact to invoke the federal court's jurisdiction." *Id.* at 1112. Because the plaintiff already had a license and could not assert that it would ever again be subject to the licensing provisions, the Ninth Court concluded that the plaintiff failed to demonstrate an injury-in-fact relating to the licensing provisions and therefore lacked standing to challenge those provisions. *Id.* at 1113-1114.

Additionally, as previously noted, case law from the Fourth, Fifth, Eighth, and Tenth Circuits is also in accord with the *Fort Lauderdale* decision. *See Peterson*, 478 F.3d at 633-634 (4th Circuit) (declining facial overbreadth standing to a litigant seeking to challenge the disclosure requirement of an administrative rule because the disclosure requirement "caused him no injury" and noting that overbreadth doctrine "'only assists plaintiffs who have suffered some injury from application of the contested provision to begin with.'" (citing *Gilles v. Torgersen*, 71 F.3d 497, 501 (4th Cir. 1995)); *Brazos Valley Coalition for Life, Inc. v. City of Bryan, Tex.*, 421 F.2d 314, 323 (5th Cir. 2005) (holding that Plaintiffs did not have standing to challenge sign provisions that were "unrelated . . . to activities in which appellants have alleged below and they engaged in."); *Eden Prairie*, 456 F.3d at 800 (8th Cir) (concluding that overbreadth challenge to entirety of sign code failed to lack of

standing and noting that "under no circumstances, however, does the overbreadth doctrine relieve a plaintiff of its burden to show constitutional standing."); *Harp Advertising*, 9 F.3d at 1292-93 (7th Cir) (concluding that an advertising company whose proposed billboard would exceed the size limitations of the sign code did not have standing to challenge the constitutionality of other provisions of the sign and zoning codes); *National Council for Improved Health*, 122 F.3d at 883 (10th Cir) (noting that the overbreadth doctrine "does not eliminate the need for the plaintiff to demonstrate its own cognizable injury-in-fact.). Accordingly, Petitioner has failed to establish that *Fort Lauderdale* conflicts with overbreadth decisions in other circuits, and in fact, no circuit has held that the overbreadth doctrine abrogates the constitutional injury-in-fact requirements.

E. The Eleventh Circuit's Former Overbreadth Jurisprudence Does Not Illustrate Recent Errors.

Petitioner also cites two decisions of the Eleventh Circuit, *National Adver. Co. v. City of Ft. Lauderdale*, 934 F.2d 283 (11th Cir. 1991) and *Granite State Outdoor Adver., Inc. v. City of St. Petersburg*, 348 F.3d 1278 (11th Cir. 2003), *cert denied* 541 U.S. 1086 (2003) in support of its assertion that the Eleventh Circuit previously permitted the type of broad facial attack at issue in *Granite-Fort Lauderdale*. However, neither *National* nor *St. Petersburg* addressed the constitutional Article III standing requirements. In fact, the *St. Petersburg* decision did not mention the standing doctrine at all. Additionally, in *National-Fort Lauderdale*, the plaintiff was permitted to challenge the constitutionality of the City's prohibition of off-site advertising and exemptions as to certain types of off-site advertising. The court did not accord National standing to engage in a wholesale facial challenge over every provision of the City's sign ordinance; nor did it determine whether National had met the constitutional injury requirement. Moreover, although the Eleventh Circuit's prior decisions in *Fort Lauderdale* and *St. Petersburg* did not specifically address the Article III standing requirements, prior case law from the Eleventh Circuit and the

former Fifth Circuit, decided prior to 1981, and which is still binding within the Eleventh Circuit, did address these issues more specifically than any decision until *Clearwater*.

In *Messer v. City of Douglasville*, 975 F.2d 1505 (11th Cir. 1992), a property owner brought suit challenging various provisions of a sign ordinance, including the variance powers of the board of appeals. The Court of Appeals held that the plaintiff did not have standing to challenge those variance powers since he had suffered no real injury. *Id.* at 1514. In *Federal Election Commission v. Lance*, 635 F.2d 1132 (5th Cir. 1981) the Federal Election Commission brought an action to enforce an administrative subpoena. The defendant refused to appear for deposition and challenged the action on the ground that the Federal Corrupt Practices Act, under which the action had been initiated, was unconstitutional. On rehearing *en banc* the Fifth Circuit upheld the validity of the subpoena, concluding that the provisions of the FCPA, which the defendant had standing to challenge, were not facially unconstitutional. *Id.* at 1134. Noting that the defendant's First Amendment attack was directed against Section 441B of the statute as a whole, the court of appeals noted that the "first question we must resolve, then, is whether Lance has standing to challenge the entire statute. We conclude that he does not." The court noted that Section 441B was not written as a single broad injunction, but rather was "a series of discrete, separable prohibitions." The court found that Lance did not have "'such a personal stake' in the constitutionality of any other portion of the Act" to challenge its constitutionality. *Id.* at 1140.

In issuing this decision, the former Fifth Circuit rejected the very same argument put forth by Granite State. In declining to apply the overbreadth doctrine in the case the court noted: "Lance argues not that the prohibition applicable to him is overbroad . . . but that *other prohibitions, tied to the one to which he is subject only by their inclusion in a common statutory scheme*, are unconstitutional." *Id.* at 1141. (emphasis added). Accordingly, the *Fort Lauderdale* decision, is consistent with

the Eleventh Circuit's decisions with regard to proper application of the overbreadth doctrine.

II. The Eleventh Circuit's Opinion Is Not A Departure From The Accepted And Usual Course Of Judicial Proceedings.

A. The Eleventh Circuit's Decision to Issue *Ft. Lauderdale* as an Unpublished Decision was Not an Abuse of the Accepted and Usual Judicial Process.

Subsequent to the issuance of *Tanner* and *CAMP*, the Eleventh Circuit has issued four unpublished decisions, all of which involved attempts by outdoor advertising companies, similar to those in *Clearwater* and *Tanner*, to bring facial challenges to the entirety of sign regulations in an attempt to strike down these ordinances which would otherwise prohibit the construction of billboards. Petitioner makes the bold accusation that in issuing these unpublished decisions, the Eleventh Circuit has attempted "to sweep these four cases 'under the rug' by issuing markedly similar unpublished decisions on a very contentious issue of law . . . ." (17). Petitioner's accusation that the Eleventh Circuit's actions are improper warrants little if any discussion.

The number of unpublished decisions that have followed *Clearwater*, *Tanner*, and *CAMP* relates directly to the number of markedly similar cases that have been filed within the Eleventh Circuit by outdoor advertising companies who seek to circumvent municipal prohibitions of billboards. As part of the scheme to invalidate sign regulations in their entirety, these plaintiffs seek facial invalidation of entire ordinances on the ground that the alleged unconstitutional provisions are not *severable* and that a company who applies for permits under a subsequently invalidated ordinance has a "*vested right*" to issuance of those permits. The hoped for result is to leave no ordinance or regulations in place with which a municipality may deny permits for billboard structures. One district judge in the Eleventh Circuit has described this alarming trend as follows:

> This instant action represents yet another case in what seems to be an ever-increasing trend through which outdoor advertising companies facially challenge municipal ordinances seeking to strike down such ordinances as entirely void. There have been a series of cases by billboard companies across the Eleventh Circuit against municipal zoning ordinances raising the same facial challenges here asserted. Through these actions, advertising companies transform the proverbial First Amendment shield, intended to protect noncommercial speech, into a sword that assures their commercial well-being.

National-Miami, 287 F. Supp. 2d at 1356-1357. Faced with the "ever-increasing trend" noted by the district court cited above, the Eleventh Circuit's decisions in *Clearwater*, *Tanner*, and *Camp* have provided much needed clarity within the Eleventh Circuit with regard to standing and overbreadth, and the Eleventh Circuit's recent unpublished decisions have simply addressed similar cases brought as part of this overall scheme. The Eleventh Circuit's policy is entirely appropriate and facilitates the development of "cohesive" case law.

Finally, it should also be noted that Petitioner's citation to Fed.R.Civ.P. 32.1, as guarding against the attempt to "obscure unpublished decisions," is wholly without merit. Rule 32.1 provides only that courts may not prohibit the citation of unpublished decision.

B. The Eleventh Circuit Did Not Misapply the Established Standard for Motions to Dismiss.

As Petitioner correctly points out, pursuant to Supreme Court Rule 10, a misapplication of Fed.R.Civ.P. 12(b), even had one occurred, would not warrant certiorari review. (15). Moreover, it is apparent that the district court's dismissal of this action was entirely appropriate. In dismissing Granite State's complaint, the District Court accepted as true, all allegations of

the Complaint (12a), including the City's Sign Regulations which were attached, by Granite State, as an exhibit. The District Court properly noted that on motion to dismiss, the court may consider the allegations in the complaint and the allegations in the exhibits attached thereto.

Reviewing the Complaint, the District Court noted that "Granite State asserts that the City denied the applications based on its prohibition of 'outdoor advertising display signs and billboards'. . . ." The District Court further noted that Granite State did not "allege any other actual or threatened injury. . . ." (15a). The District Court, as well as the Eleventh Circuit, based its decisions with respect to standing on the injuries alleged by Granite State in its Complaint. Thus, the District Court properly accepted the factual allegations as true and determined that, based on this Court's standing requirements, the Plaintiff had no standing as a matter of law. The district court was free to reject Granite State's own conclusory allegations of law and unwarranted inferences. *Silver v. H&R Block, Inc.*, 105 F.3d 394, 397 (8th Cir. 1997).

The Eleventh Circuit correctly upheld the District Court's dismissal and similarly determined, with regard to Granite State's attempt to challenge provisions under which it had not suffered injury, that "[t]he problem for Granite State it did not allege in its complaint that it intended to engage in any form of expression governed by these provisions of the Sign Ordinance." (7a). Accordingly, the dismissal of Granite State's complaint was wholly appropriate and does not warrant certiorari review by this Court.

CONCLUSION

The Eleventh Circuit's decision correctly determined that Granite State did not have standing to challenge the remaining portions of Fort Lauderdale's sign regulations, under which it suffered no injury. Although legitimate First Amendment concerns are of paramount importance to courts, "plaintiffs must not be allowed to manipulate courts' visceral need to protect the First Amendment. Instead, courts must vigilantly reject arguments intended to pervert that Amendment's primary purpose." *National*, 287 F. Supp. 2d at 1356. The Eleventh Circuit Court of Appeals, in denying standing to the Petitioner, has appropriately and necessarily, continued to alleviate further manipulation of the First Amendment in the Eleventh Circuit. For the foregoing reasons, the Petition should be denied.

Respectfully submitted,

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IN THE UNITED STATES SUPREME COURT

GRANITE STATE OUTDOOR ADVERTISING, INC.,

Petitioner,

v.

CITY OF FORT LAUDERDALE, FLORIDA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY BRIEF

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INTRODUCTION

From the outset of its Brief in Opposition, the Respondent creatively attempts to obscure and undermine the importance of the question presented by Petitioner. Rather than take on the crux of the issue presented by Granite State, namely whether overbreadth standing no longer operates to allow an applicant for a sign to facially challenge the lack of procedural safeguards in a sign permitting regulation, Respondent sidesteps the issue almost completely, choosing instead to focus on its theory that the overbreadth doctrine has never allowed a facial challenge to a law unless the litigant has suffered an injury-in-fact under the particular provision that it seeks to challenge. *See* Brief in Opp., p. i. However, as this Court has consistently allowed litigants to challenge the lack of procedural safeguards in prior restraints, the Eleventh Circuit's departure from this body of law presents a matter of great importance.

I. THIS COURT HAS ROUTINELY ALLOWED FACIAL CHALLENGES TO LICENSING SCHEMES IN SITUATIONS WHERE THE USE IN QUESTION WAS PROHIBITED.

In an effort to diminish the difference between the approach adopted by the Eleventh Circuit with respect to facial challenges in *Granite State Outdoor Advertising, Inc. v. City of Fort Lauderdale*, 2006 WL 2560679 (11th Cir. Sept. 6, 2006), and the approach taken by other circuits, Respondent asserts that decisions like *R.S.W.W., Inc. v. City of Keego Harbor*, 397 F.3d 427 (6th Cir. 2005), and *Lamar Advertising of Penn, LLC v. Town of Orchard Park*, 356 F.3d 365 (2d Cir. 2004), are distinguishable in part because the underlying use at issue in those cases was permitted, whereas here, the use sought by Granite State was purportedly banned. *See* Brief in Opp., pp. 20-24. Such an argument is undermined by the fact that this Court has specifically entertained facial challenges to permitting schemes where the

proposed use was banned. E.g., *City of Littleton v. Z.J. Gifts D-4, L.L.C.*, 541 U.S. 774, 124 S. Ct. 2219 (2004); *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 110 S. Ct. 596 (1990).

In *FW/PBS*, for example, this Court considered a litigant's challenge to an adult entertainment ordinance. Before the trial court, the plaintiffs challenged the constitutionality of a new ordinance which rendered their existing stores nonconforming and required that they be closed within three years. *Dumas v. City of Dallas*, 648 F. Supp. 1061, 1067 (N.D. Tex. 1986). Even though the existing businesses already had licenses, the lower court permitted them to challenge the licensing scheme of the new ordinance, holding "[i]t is clear that a party may challenge a licensing statute regardless of whether he or she was denied a permit, or whether one has ever been sought." *Id.* After the bulk of the ordinance was upheld, including the licensing scheme, the plaintiffs appealed. *FW/PBS, Inc. v. City of Dallas*, 837 F.2d 1298 (5th Cir. 1988). On appeal, the Fifth Circuit found that the licensing scheme used by the city satisfied constitutional standards. *Id.* at 1301-04.

On appeal to this Court, the petitioners were afforded standing to challenge the licensing scheme. 493 U.S. at 223-30, 110 S. Ct. at 603-07. After finding that the plaintiffs had standing, this Court found that the licensing scheme was unconstitutional because it lacked the necessary procedural safeguards. *Id.* Even though the continued operation of the adult establishments was expressly prohibited, this Court permitted the petitioners to challenge the licensing scheme. *Id.* In contrast, the approach adopted by the Eleventh Circuit below would have dictated that the case be dismissed for lack of standing because the proposed use was not permitted. (App. 6a-7a). Thus, *FW/PBS* shows that Granite State should have been afforded standing to challenge the licensing provisions of the Ft. Lauderdale sign code.

This Court's decision in *Littleton* is in accord. In *Littleton*, the Court addressed the constitutionality of an adult business ordinance. 541 U.S. at 776-77, 124 S. Ct. at 2221-

22. The respondent in *Littleton* had opened up an adult bookstore in a location where the city expressly prohibited such a business. 541 U.S. at 777, 124 S. Ct. at 2222. Even though the bookstore was properly banned in that location, the Tenth Circuit found that the respondent had standing to challenge the licensing provisions of the ordinance. 311 F. 3d at 1226-27. After the Tenth Circuit found the permitting requirements facially unconstitutional, the city appealed to this Court. 541 U.S. at 778, 124 S. Ct. at 2222.

Although this Court reversed the decision of the Tenth Circuit and found that the ordinance did indeed provide for a prompt judicial determination, in doing so, the Court permitted the plaintiff standing to facially challenge the judicial review provisions even though the plaintiff never attempted to obtain judicial review of the city's citation. 541 U.S. at 777-78, 782-84, 124 S. Ct. at 2222, 2225-26. As *Littleton* makes clear, plaintiffs who suffer any harm under a regulation can facially challenge *invalid procedural provisions* that are alleged to be overbroad in their application. As the approach adopted by the Eleventh Circuit is inconsistent with *Littleton*, this petition should be granted.[1]

Given that this Court has expressly afforded a litigant standing to facially challenge a licensing scheme in instances where the underlying use was prohibited, Respondent's attempt to distinguish the case law relied upon by Petitioner in its opening brief on this ground is unpersuasive.

Equally as unpersuasive is Respondent's attempt to distinguish the Sixth Circuit's opinion in *R.S.W.W.* by citing that circuit's recent opinion in *Prime Media, Inc. v. City of*

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[1] Respondent's attempt to rely on *Littleton* for the premise that individuals who are denied a license are free to bring as-applied challenges is misplaced. *See* Response in Opposition, p. 14. This Court was simply noting that while the licensing scheme at issue provided sufficient procedural safeguards on its face, special problems of undue delay with respect to the licensing scheme could be raised on an as-applied basis. Such commentary in no way implies that one who submits a license is limited to only bringing an as-applied challenge.

Brentwood, 474 F.3d 332 (6th Cir. 2007). *See* Brief in Opp., pp. 20-21. This opinion has now been vacated by the Sixth Circuit and replaced with an amended opinion that explicitly recognizes the ability of an applicant to facially challenge a prior restraint on speech. *Prime Media, Inc. v. City of Brentwood*, __ F.3d __, 2007 WL 1324951, at *6-7 (6th Cir. May 8, 2007) (citing *Lakewood*). While the court held that the sign applicant in *Brentwood* could not facially challenge the licensing scheme, such conclusion was dictated by the fact that the ordinance in question removed the licensing requirement altogether, allowing individuals to display signs without obtaining a permit. *Id.* at *7. The Sixth Circuit made it clear that in cases such as this one, where Granite State was required to first obtain a permit before posting a sign, a plaintiff can facially challenge the licensing scheme on the grounds that it conveys unbridled discretion in government officials. *Id.* at *6 (citing *G & V Lounge v. Michigan Liquor Control Comm'n*, 23 F.3d 1071, 1075 (6th Cir. 1994)). Despite Respondent's assertions to the contrary, the divergence between the approach adopted by the Sixth Circuit and the Eleventh Circuit could not be more apparent.

Similarly, Respondent's attempt to distinguish *Peachlum v. City of York*, 333 F.3d 429 (3d Cir. 2003), by relying on *Service Employees Int'l Union v. Municipality of Mt. Lebanon*, 446 F.3d 419 (3d Cir. 2006), is undermined by the Third Circuit's recent opinion in *Riel v. City of Bradford*, __ F.3d __, 2007 WL 1288578 (3d Cir. May 3, 2007). In *Riel*, the Third Circuit permitted the plaintiffs to facially challenge numerous provisions of two ordinances that were never applied to them. *Id.* at *1-4. While the plaintiffs initially challenged the fact that they had been cited for displaying various signs without obtaining a permit, the city entered into a consent order staying prosecution of those citations and amended the ordinances in question. *Id.* at *1. Unsatisfied, the plaintiffs mounted a facial challenge to the amended ordinances, including the permitting requirement, even though the codes now allowed the plaintiffs to display

many of the proposed signs without a permit. *See Riel v. City of Bradford*, 2005 WL 2106554, at *20-23 (W.D. Pa. Aug. 31, 2005). Even though the district court and the Third Circuit found the amended ordinances to be constitutional, both courts afforded plaintiffs standing to facially challenge these ordinances even though they had never been "injured" under the amended ordinances. 2005 WL 2106554, at *20-23; 2007 WL 1288578, at *9-17. Thus, the contrast between the approaches of the Third and Eleventh Circuits is stark.

Moreover, the Eleventh Circuit's methodology of looking at the particular facts of a litigant's case in order to limit or constrain a facial challenge is inconsistent with the approach advocated by this Court. *See Forsyth County v. Nationalist Movement*, 505 U.S. 123, 133 n.10, 112 S. Ct. 2395, 2403 (1992) (holding "[f]acial attacks on the discretion granted a decisionmaker are not dependent on the facts"); *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 770, 108 S. Ct. 2138, 2151 (1988); *Thornhill v. Alabama*, 310 U.S. 88, 97, 60 S. Ct. 736, 742 (1940) ("It is not merely the sporadic abuse of power by the censor but the pervasive threat inherent in its very existence that constitutes the danger"); *see also R.S.W.W.*, 397 F.3d at 436-37; *Southworth v. Board of Regents*, 307 F.3d 566, 574 (7th Cir. 2002). The Eleventh Circuit's abandonment of this well-established approach warrants review.

II. RESPONDENT'S ATTEMPT TO DIMINISH THE FIRST AMENDMENT IMPLICATIONS OF SIGN REGULATION IS UNPERSUASIVE.

In an attempt to persuade this Court that a facial challenge under the overbreadth doctrine should not be applicable in this instance, the City attempts to argue that because sign ordinances regulate structures instead of regulating the speech or conduct of an outdoor advertising plaintiff, the licensing schemes associated with sign ordinances should not be under the purview of the

overbreadth doctrine. *See* Brief in Opp., pp. 17-18. As this Court has often acknowledged, however, control of the medium of speech is tantamount to control of the speech itself. For example, the regulation of newsracks or cable television wires is subject to constitutional protections. *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 415, 113 S. Ct. 1505, 1509 (1993) (newsracks entitled to First Amendment protection as the "manner" in which speech is distributed); *Turner Broadcasting Sys., Inc. v. FCC*, 520 U.S. 180, 214, 117 S. Ct. 1174, 1198 (1997) (recognizing regulations on cable television subject to First Amendment protections). Signs are, of course, an even more fundamental medium of speech. *City of Ladue v. Gilleo*, 512 U.S. 43, 54-55, 114 S. Ct. 2038, 2045 (1994); *Metromedia v. City of San Diego*, 453 U.S. 490, 501, 101 S. Ct. 2882, 2889 (1981) ("Billboards are a well-established medium of communication, used to convey a broad range of different kinds of messages"). Thus, Respondent's suggestion that the regulation of signs does not sufficiently impact the First Amendment as to trigger the need for facial challenges under the overbreadth doctrine is without merit.

Equally as unpersuasive is Respondent's attempt to dismiss precedent from other circuit courts that addresses adult entertainment licensing schemes. *See* Brief in Opp., p. 18 n.2. As this Court noted in *Littleton*, "'[t]he core policy underlying *Freedman* is that the license for a First Amendment-protected business must be issued within a reasonable period of time, because undue delay results in the unconstitutional suppression of protected speech.'" 541 U.S. at 780, 124 S. Ct. at 2224. Thus, the question is not what type of First Amendment-protected business activity the courts are considering, but whether the business for which a license is required is protected by the First Amendment. *Id.* As this Court's decisions in *Ladue* and *Metromedia* illustrate, communicating via signs and billboards is protected by the First Amendment. Thus, this Court's precedents involving

other First Amendment-protected activities such as adult entertainment are applicable.

III. RESPONDENT'S INTERPRETATION OF THE OVERBREADTH DOCTRINE STRIPS THE DOCTRINE OF ANY BENEFIT TO SOCIETY.

As Granite State noted in its opening brief, this Court has long recognized that speech restrictions "must be narrowly drawn and represent a considered legislative judgment that a particular mode of expression has to give way to other compelling needs of society." *Broadrick v. Oklahoma*, 413 U.S. 491, 611, 93 S. Ct. 2794, 2915 (1985). This Court has also noted that it "has altered its traditional rules of standing to permit – in the First Amendment area – 'attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated.'" Id. at 612, 93 S. Ct. at 2916 (citing *Dombrowski v. Pfister*, 380 U.S. 479, 486, 85 S. Ct. 1116, 1121 (1965)). Therefore, litigants "are permitted to challenge a statute not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech." *Broadrick*, 413 U.S. at 612, 93 S. Ct. at 2916.

A primary reason the overbreadth doctrine was created was to encourage the evaluation and removal of unconstitutional speech restrictions where most of those regulated have little or no ability to assert a challenge. The overbreadth doctrine was developed "to enable persons who are themselves unharmed by the defect in a statute nevertheless to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others, ***in other situations not before the Court***." *Board of Trustees v. Fox*, 492 U.S. 469, 484, 109 S. Ct. 3028, 3037 (1989) (emphasis added). The "other situations" to which the Court referred were the enforcement of provisions that infringed

upon the speech rights of third parties, but not necessarily the plaintiff's rights. By limiting a litigant's ability to bring an overbreadth claim to only provisions directly applied to that litigant, the social benefit of overbreadth is removed.

As this Court noted in *Secretary of State v. Joseph H. Munson Co.*, 467 U.S. 947, 104 S. Ct. 2839 (1984),

> Facial challenges to overly broad statutes are allowed not primarily for the benefit of the litigant, but for the benefit of society – to prevent the statute from chilling the First Amendment rights of other parties not before the court. Munson's ability to serve that function has nothing to do with whether or not its own First Amendment rights are at stake. *The crucial issues are whether Munson satisfies the requirement of "injury-in-fact," and whether it can be expected satisfactorily to frame the issues in the case.* If so, there is no reason that Munson need also be a charity.

467 U.S. at 956-58, 104 S. Ct. at 2846-48 (emphasis added). The recent decisions from the Eleventh Circuit, as evidenced by the *Ft. Lauderdale* decision at bar, threaten to remove all of the social benefits of the overbreadth doctrine.

Of course, such a limitation suits Respondent, because it enables municipalities to regulate communication via signs without being subject to a facial challenge. Respondent's invocation of this Court's "substantial social costs" warning regarding the over-application of the overbreadth doctrine further shows the lengths to which municipalities will go to defend unconstitutional ordinances.

In *Virginia v. Hicks*, 539 U.S. 113, 119, 123 S. Ct. 2191, 2197 (2003), the Supreme Court warned that "there are substantial social costs created by the overbreadth doctrine when it blocks application of a law to constitutionally *unprotected* speech, or especially to constitutionally *unprotected* conduct." (emphasis added). However, as this

Court established in *Metromedia* and *Ladue* that signs are a constitutionally protected medium for speech, the warning from *Hicks* is inapplicable. What is applicable from *Hicks*, however, is this Court's statement that proper use of the overbreadth doctrine "reduces the[] social costs caused by the withholding of protected speech." Id. at 119, 123 S. Ct. at 2196. Thus, Granite State's invocation of the overbreadth doctrine was proper and the Eleventh Circuit's continual erosion of the doctrine should be re-evaluated.

IV. THE ELEVENTH CIRCUIT'S EN BANC *TANNER* DECISION DID NOT RESOLVE THE CIRCUIT'S DISPARATE OPINIONS ON THE ISSUE OF STANDING.

In an effort to portray cohesiveness in the Eleventh Circuit's overbreadth jurisprudence, the Respondent contends that "[o]n rehearing *en banc* the Eleventh Circuit upheld the district court's decision that Tanner lacked standing to challenge provisions of the ordinance that were not applicable to it." *See* Brief in Opp., p. 9. To the contrary, however, the Eleventh Circuit did not uphold the district court's decision, but rather explicitly dismissed the appeal as moot based on the county's passage of an amended sign ordinance. *Tanner Adver. Group, L.L.C. v. Fayette County*, 451 F.3d 777, 780 (11th Cir. 2006). The only discussion of standing was whether Tanner had standing to challenge the only provision of the former sign code that was preserved in the 2005 ordinance. *Id.* at 790-91. For Respondent to assert that the Eleventh Circuit's decision in *Ft. Lauderdale* is based on *Tanner* simply defies common sense. The court itself noted that it left that issue for another day as a result of mootness. 451 F.3d at 791. Rather than address standing in *Tanner*, the court issued four far-reaching *unpublished* decisions in the months thereafter.

Respondent *needs* to show continuity between *Tanner* and *Ft. Lauderdale* so that it can discount Granite State's

accurate conclusion that the Eleventh Circuit has decided the overbreadth issue *sub silentio* in the wake of *Tanner*, without actually issuing a decision on the merits. How else can Respondent explain the obvious differences between *Granite State Outdoor Advertising, Inc. v. City of St. Petersburg*, 348 F.3d 1278 (11th Cir. 2003), where a litigant was allowed to facially challenge the licensing scheme, and the Eleventh Circuit's recent decisions in *Advantage Advertising, L.L.C. v. City of Hoover*, 2006 WL 2344957 (11th Cir. Aug. 11, 2006), and *Ft. Lauderdale*, among others, where litigants were denied the same opportunity? For this important issue to be decided *sub silentio* is a departure from the accepted course of judicial proceedings and warrants review by this Court.

CONCLUSION

This Court has consistently allowed a litigant to facially challenge a prior restraint on speech, even when the underlying use is prohibited. Most circuit courts concur. Thus, review of the Eleventh Circuit's aberrant holdings is needed. The Eleventh Circuit's systematic narrowing of overbreadth threatens the ability of First Amendment-protected businesses to bring facial challenges and thus defeats one of the primary purposes underlying the overbreadth doctrine: encouraging economically motivated parties to challenge speech restrictions for the benefit of those who are unlikely to bring suit.

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